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

Zhu, J.

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Straightjacket:  
*Same-Sex Orientation under Chinese Family Law*  
*Marriage, Parenthood, Eldercare*



# Straightjacket:

*Same-Sex Orientation under Chinese Family Law  
Marriage, Parenthood, Eldercare*

PROEFSCHRIFT

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*door*

Jingshu Zhu

geboren te Nanchong, China

in 1990

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## List of Frequently Used Abbreviations

Abbreviations	Full Term in English	Full Term in Chinese
ART	Assisted Reproductive Technology	人工辅助生殖技术
CCMD-3	Chinese Classification of Mental Disorder, the 3 <sup>rd</sup> version	中国精神疾病分类与诊断标准第3版
CEDAW	Committee on the Elimination of Discrimination against Women	消除对妇女一切形式歧视公约
CPPCC	Chinese People's Political Consultative Committee	中国人民政治协商会议
ICCPR	International Covenant on Civil and Political Rights	公民及政治权利国际公约
IUI	Intrauterine Insemination	宫腔内人工受精
IVF-ET	In Vitro Fertilization and Embryo Transfer	体外受精胚胎植入
LGBTI	Lesbian, Gay, Bisexual, Transgender, Intersex	男女同性恋、双性恋、跨性别、间性人
MSM	Men who Have Sex with Men	男男性行为者
NPC	National People's Congress	全国人民代表大会
OGI	Open Government Information	政府信息公开
PFLAG	Parent and Friends of Lesbians and Gays	同性恋亲友会
SARFT	State Administration of Press, Publication, Radio, Film and Television of the People's Republic of China	国家新闻出版广电总局
SOGIE	Sexual Orientation, Gender Identity and Gender Expression	性倾向、性别认同、性别表达
UNHRC	United Nations Human Rights Council	联合国人权理事会
UPR	Universal Periodical Review	普遍定期审议



## List of Frequently Used Chinese Terms

Pronunciation	Chinese Words	English Meaning
guanxi	关系	Social connection
guanxiren	关系人	Related person
gudu zhonglao	孤独终老	Aging and dying alone
guoji	过继	Intra-familial de facto adoption
hukou	户口	Household registration certificate
jiehun	结婚	To get married
lala	拉拉	Chinese vernacular of lesbian
louxian	露馅	To reveal a secret by accident
pian zigong	骗子宫	Womb fraud
pianhun	骗婚	Marriage fraud
shengzi	生子	To give birth
tongfu	同夫	The husband of a same-sex-oriented woman
tongqi	同妻	The wife of a same-sex-oriented man
tongzhi	同志	Comrade, Chinese vernacular of gay people
wubao hu	五保户	Recipient of 'five guarantees'
xiaoshun	孝顺	Filial piety
xinghun	形婚	Cooperative marriage
yanglao	养老	To live an old age
yizeng fuyang xieyi	遗赠扶养协议	Legacy-support agreement
zhexiu bu	遮羞布	Fig leaf, or a cloth to cover up something embarrassing
zhongguo tese	中国特色	Chinese characteristics
zhunsheng zheng	准生证	Family planning service certificate or the so-called 'birth permit'
zili gengsheng, jianku chuangye	自力更生、 艰苦创业	Self-reliance and hard work



## Note on (the Always Inaccurate) Terminology

...[Y]ou must say it; you use that language; you become dirtied by the language; you know you're lying; you know it's false, but you do use it. And you live with the consequences of this catachresis, this use of a term to describe something in a radically improper way... The assertion of identity can never become the end of politics itself.

— Butler Judith, 'Changing the Subject: Judith Butler's Politics of Radical Resignification' (2000) 20 *JAC: A Journal of Composition Theory* 4, 727-765, 743.

The above words eased my long-standing concern of being unable to name the people I encounter properly. Since imposition and inaccuracy is inevitable, we do not have to reject labeling and categorization altogether, as long as we keep them open. This note briefly explains how the terms *tongxinglian*, homosexuality, lesbian, gay, bisexual, LGBT, same-sex-oriented people, queer, *tongzhi* and *tongqi* are used in different contexts in this thesis. I italicize all Chinese words and phrases, to emphasize their historicity and dynamics. I use these Chinese terms also in plural for English grammatical consistency.

When '*tongxinglian*' appears in formal legislation, judgments or administrative documents as a descriptive term of homosexual behaviors,<sup>1</sup> I translate it into 'homosexuality'. Occasionally I also use 'homosexual(ity)' to make abstract analysis. However, I try to avoid directly imposing this term on individuals, because it used to have, and still has, a pathological connotation.<sup>2</sup>

The terms 'gay', 'lesbian', 'bisexuals', or the acronym lesbigay or LGB, owing to global LGB rights advocacy, seem less pathological and suggest a history of struggle and a sense of community. However, not every Chinese person who has same-sex attraction, behaviors or relationships would self-identify with these recently popularized terms, especially for those who are less exposed to the LGB subculture online or in metropolises. Therefore, I use 'lesbian', 'gay' and 'bisexual' to refer to those who call themselves as such, and 'same-sex-oriented people'<sup>3</sup> to include both self-identified lesbian, gay, bisexual and pansexual persons, and those who have no clear sexual identities. The using of the rather cumbersome 'same-sex-oriented people' also aims to emphasize the crucial but often neglected difference between

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1 See Chapter 2.

2 For an elaborated history of incomplete depathologization of homosexuality in China, see Wenqing Kang, 'Decriminalization and Depathologization of Homosexuality in China' in Timothy B Weston and Lionel M Jensen (eds) *China in and beyond the Headlines* (Rowman and Littlefield, Lanham) 231-248; Tze-Lan D Sang, *The Emerging Lesbian: Female Same-Sex Desire in Modern China* (University of Chicago Press, Chicago and London, 2003).

3 I prefer 'orientation' to 'attraction' because the former includes, but is not limited to sexual desire. For the elaboration of the word 'orientation', see Kees Waaldijk, 'The Right to Relate: A Lecture on the Importance of "Orientation" in Comparative Sexual Orientation Law' (2013) 24 *Duke Journal of Comparative and International Law* 1, 161-199.

same-sex marriage and gay marriage, and similarly, between different-sex marriage and heterosexual marriage.<sup>4</sup> Such conflation ignores the cultural-economic-political functions of the marriage institution beyond legitimizing heterosexual love and procreation, which this thesis will unpick carefully.

'Gay' is occasionally used as shorthand for both same-sex-oriented men and women in a less formal context, especially when juxtaposed with 'straight', a casual expression for 'heterosexual(ity)'. LGBT is used for expediency in the discussion of activism in Chapter 6, although it underrepresents the ever expanding 'alphabet soup' of sexual and gender identities. SOGIE (sexual orientation, gender identity and expression) will be used in accordance to the international human rights language in Chapter 6, but will appear less frequently in other chapters.

'Queer' denotes a radical stance against normativity, the aspiration of which goes beyond state recognition of rights and citizenship. Nonetheless, it is even more exotic than LGB for most ordinary Chinese people I met, and there is not an equivalent history of a 'reverse discourse'<sup>5</sup>. My use of 'queer' as an identity marker in this book is therefore prudent, only for those who call themselves as such. However, queer as an adjective or a verb enshrines the spirit of anti-normativity,<sup>6</sup> which should not be relinquished by non-Western scholars simply because the word has a Western 'origin'. Therefore, I do not shy away from using 'queer' or 'queering' when carrying out critical analysis.

---

4 Ning has discussed thoroughly this difference and argued that the challenging of the fact that only different-sex couples can get married should not be directed to 'gay rights and equality', but to the history and functions of marriage, as well as the issues of redistribution and individualization. See Yin-Bin Ning, 'Same-Sex Marriage Is Not Gay Marriage: Its Implication and Aftermath (同性婚姻不是同性恋婚姻：兼论传统与个人主义化)' (2017) 62 *Applied Ethics Review* 5-35.

5 Michel Foucault, *The History of Sexuality (Volume 1: An Introduction)* (Pantheon Books, New York, 1978) 101. For the different genealogies of queer and Chinese *kuer*, see Fran Martin, *Situating Sexualities: Queer Representation in Taiwanese Fiction, Film and Public Culture* (Hong Kong University Press 2003) 22-26.

6 For the anti-normative ethos of queer theory, see Dean Spade and Craig Willse, 'Norms and Normalization' (2015) *The Oxford Handbook of Feminist Theory* April, 1-15; Judith/Jack Halberstam, 'The Anti-Social Turn in Queer Studies' (2008) 5 *Graduate Journal of Social Science* 2, 140-156; For critiques of queer theory as being coopted in liberal discourses, see David M Halperin, 'The Normalization of Queer Theory' (2008) 45 *Journal of Homosexuality* 2-4, 339-343; David L Eng, *The Feeling of Kinship: Queer Liberalism and the Racialization of Intimacy* (Duke University Press, Durham, 2010).

'Tongzhi' or 'comrade' is often used in China-studies literature<sup>7</sup> in order to highlight the specificities of a less explicitly homophobic culture that is substantially different from Western modernity.<sup>8</sup> However, oftentimes the endeavor to search for 'difference' ends up essentializing both 'the Chinese' and 'the West'.<sup>9</sup> For the same reason stated above, I do not think *tongzhi* is necessarily more precise than lesbian, bearing in mind those who live without any of these identities. Therefore, I use *tongzhi* (and *nv tongzhi*, female homosexual) only when my respondents do so. A China-specific term (which is not to say other countries do not have the similar phenomenon) is '*tongqi*', meaning a woman who is married to a male *tongzhi*. Since it is highly contextual and involves specific socio-legal-emotional dynamics, I choose not to translate it.

Hopefully, in my writing, all these words could play against one another and illuminate the limitations of each other.<sup>10</sup> Read together, they enable us to catch a glimpse of the richness of the subjectivities and lived experiences that can never be fully captured. After all, 'difference is the name we can give to any identity'.<sup>11</sup>

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- 7 Rachel Leng, 'Chinese Comrade Literature, Queer Political Reality, and the Tongzhi Movement in Mainland China' (Undergraduate Honors Thesis, Sanford School of Public Policy, Duke University, 2012); Wah-Shan Chou, *Tongzhi: Politics of Same-Sex Eroticism in Chinese Societies* (Haworth Press, New York, 2000); Jing Wu Ma, 'From "Long Yang" and "Dui Shi" to Tongzhi: Homosexuality in China' (2008) 7 *Journal of Gay & Lesbian Psychotherapy* 12, 117-143.
  - 8 The discussion of cultural difference is evident in early *tongzhi* studies, see e.g., Wah-Shan Chou, *Post-Colonial Tongzhi* (Hong Kong Tongzhi Research Institute Publishing House, Hong Kong, 1997).
  - 9 Jeroen de Kloet, 'Gendering China Studies: Peripheral Perspectives, Central Questions' (2008) 22 *China Information* 2, 195-219; Nai-Fei Ding and Jen-Peng Liu, 'Reticent Poetics, Queer Politic (含蓄美学与酷儿攻略)' in Nai-Fei Ding, Jen-Peng Liu and Amie Parry (eds) *Penumbrae Query Shadow: Queer Reading Tactics* (Center for the Study of Sexualities, National Central University, 2007) 1-5.
  - 10 Lydia H Liu, Rebecca E Karl and Dorothy Ko, *The Birth of Chinese Feminism: Essential Texts in Transnational Theory* (Columbia University Press, New York, 2013) 12.
  - 11 Elizabeth Grosz, *Becoming Undone: Darwinian Reflections of Life, Politics and Art* (Duke University Press, Durham and London, 2011) 94.



'To me, marriage is simply a fig leaf (*zhexiu bu*) that pleases my parents and makes my own life easier. Now that I have already put on this fig leaf, I might as well wear the whole outfit (*yifu*) and make it more presentable.'

— Interview with Jasmine, July 2014

### 1.1 STRAIGHTJACKET

Jasmine, a lesbian-identified woman, and her gay husband are in a cooperative marriage.<sup>1</sup> As an 'infertile' couple, they were able to have a child via in vitro fertilization in a public hospital. By wearing the 'outfits' of a straight-looking family, Jasmine and her girlfriend, her husband and his boyfriend have created some precious space to nourish their same-sex relationships. Meanwhile, acting as a married woman is freighted with a host of legal and social implications, and that is not always an easy task.<sup>2</sup>

Inspired by Jasmine's vivid description of donning an outfit for 'acting straight', this thesis uses 'straightjacket' as its central metaphor.<sup>3</sup> 'Straight' in this thesis mainly refers to the heteronormative,<sup>4</sup> ideal family-life trajectory: entering into a different-sex marriage, giving birth to children and living one's old age under the care of offspring, or in Chinese, *jiehun shengzi yanglao*. Like gender, such an ideal is not a given, but is repeated and standardized through our daily practices, and it is an ideal that many people hope to approximate to but no one can perfectly actualize.<sup>5</sup> A 'jacket' is arguably a more appropriate metaphor for the straight familial life than a 'closet' or a 'mask',<sup>6</sup> because clothing is a necessity for both gay and straight

1 Cooperative marriage in this thesis refers to a negotiated marriage, with or without formal registration, between a same-sex-oriented woman and a same-sex-oriented man.

2 Jasmine's story will be told more substantially in Chapters 3 and 4.

3 So far there is one non-academic book elaborating straightjacket in relation to gay life, namely, Mathew Todd, *Straight Jacket: How to Be Gay and Happy* (Bantam Press, London, 2016). However, Todd mainly refers 'straight jacket' to the trauma many have experienced growing up gay in the Western context, whereas my theorization of multiple functions of the straightjacket presents the nuances of heteronormative familial life in and beyond China.

4 Concurring with Berlant and Warner, this book uses heteronormativity to refer to 'more than ideology, or prejudice, or phobia against gays and lesbians; it is produced in almost every aspect of the forms and arrangements of social life'; Lauren Berlant and Michael Warner, 'Sex in Public' (1998) 24 *Critical Inquiry* 2, 547-566, 554. For a sliding scale of heteronormativity, see Saskia E Wieringa, *Heteronormativity, Passionate Aesthetics and Symbolic Subversion in Asia* (Sussex Academic Press, Brighton. Chicago, Toronto, 2014), 217-234.

5 This is a plain paraphrase of Butler's performativity theory, see Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, New York, 1990).

6 Theorization of 'mask' can be found in Hans Tao-Ming Huang, *Queer Politics and Sexual Modernity in Taiwan* (Hong Kong University Press 2011); Katsuhiko Suganuma, 'Associative Identity Politics: Unmasking the Multi-layered Formation of Queer Male Selves in 1990s Japan' (2007) 8 *Inter-Asia Cultural Studies* 485-502.

people to keep warm and conform with social norms, whereas the latter two are often deemed redundant for heterosexuals. The function of a jacket to keep one warm echoes the importance of marriage and family in providing for food and shelter. The longing for a decent 'normal' family for practical reasons, not just as a facade or as social camouflage to save face, especially for people in lower socio-economic strata regardless of sexual orientation, will be taken seriously throughout this thesis.

'Everyone covers', says Yoshino, revealing that even a middle-class straight white man would feel it imperative to downplay his 'abnormal' aspects so as to be 'ordinary'.<sup>7</sup> And Sacks argues convincingly that 'an ordinary person' is actually not a person, but one's job; it requires training and practice, as well as the constant efforts to know what other people are doing ordinarily.<sup>8</sup> In other words, one is not born ordinary; rather one is always 'doing "being ordinary"'.<sup>9</sup> The same can be said about 'doing "being straight"', or 'straight drag'<sup>10</sup>. It is a skill straight and gay alike have to work on, except that straight people almost forget how they learned it, whereas gay people always have to 'do rigorous anthropological fieldwork of their own' so as to intentionally pick the skill up in all its particularities.<sup>11</sup>

The straightjacket of an 'ordinary' familial life is therefore an important stage prop in the cause of performing straight. Nonetheless, no matter how helpful it is in shielding an 'abnormal' person from legal punishment, moral judgments and economic disadvantages, a straightjacket is still restrictive. Throughout history, and until today, it has been used to punish and discipline those who are considered deviant and harmful to others. It has been used as an instrument of torture on criminals in prison, or to pacify patients in madhouses. The utility of straitjackets is surprisingly analogous to the social control of homosexuality.<sup>12</sup> Homosexuality, in many countries including China, has been treated as either a crime or a mental illness, or both. Nowadays, China still criminalizes group, commercial or pornographic homosexual sex and uses blatant conversion therapy in hospitals or clinics.<sup>13</sup>

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7 Kenji Yoshino, *Covering: The Hidden Assault on Our Civil Rights* (Random House 2006) 1.

8 Harvey Sacks, 'On Doing "Being Ordinary"' in Maxwell Atkinson and John Heritage (eds), *Structures of Social Action: Studies in Conversation Analysis* (Cambridge University Press, Cambridge, 1984).

9 Ibid.

10 Halperin uses the term 'straight drag' to highlight the performativity of gender and heterosexuality, see David M Halperin, *How to Be Gay* (The Belknap Press of Harvard University Press, Cambridge, London 2012) 196. Newton has also argued that drag symbolizes that the visible, social clothing is a costume, which in turn symbolizes that the entire sex-role behavior is a role—an act. See Esther Newton, *Mother Camp: Female Impersonators in America* (University of Chicago Press, Chicago, London 1972) 108.

11 Halperin, *How to Be Gay* (2012) 196.

12 See Chapter 2.

13 The nuances of China's criminalizing, pathologizing and regulating of homosexuality will be discussed in Sections 2.2.3 and 6.3.2.

If we follow Foucault's insights, we may find prisons and madhouses as instruments of state authority are used less often by modern societies to confine homosexuals; instead, power exercised through discipline and regulation has become ubiquitous, insidious and increasingly meticulous.<sup>14</sup> In addition to tying and binding same-sex desire through criminal indictment or medical diagnosis, same-sex-oriented people are also pushed and/or lured into wearing an apparently looser straightjacket: maintaining a straight-looking family life. Compared with surgeries or electric shock therapy, this designer straightjacket has been co-opted as a more humane and economic way of taming the deviant and making them useful,<sup>15</sup> while hiding its own cruelty.

Interestingly, however, a straitjacket is not just a tool that constrains one's freedom; for an escapist, it is also part of their stage magic and a valuable tool with which to make a living.<sup>16</sup> Likewise, straight family life can imply multiple meanings and possibilities for same-sex-oriented people, some of whom volunteer to be tied up and then manage to wiggle out. Those in gay-and-lesbian cooperative marriages are just like the magicians who use a gimmicked straightjacket to bewilder the audience.<sup>17</sup> They try to create a little slack in the sleeves by negotiating away some of the wholesale obligations of marriage. Of course, a magic trick is not supernatural – no matter how skillful the escape artist is, wearing an institutional and ideological straightjacket for long periods can still be suffocating.

Meanwhile, those who are in mixed-orientation marriages<sup>18</sup> may feel the restriction and pain caused by the straightjacket even more. Once having tied the knot with an unsuspecting spouse, a same-sex-oriented person is also bound by the moral and legal requirements of monogamy, conjugal love, marital sex and emotional support. Conflicts may occur when the straight-dragging ruse is discovered, and the failed escapologists – especially men – are shamed as 'marriage frauds', a stigma that brings with it a host of legal and moral dilemmas.

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14 See Michel Foucault, *Discipline and Punish* (Vintage, New York, 1979); Michel Foucault, *The History of Sexuality (Volume 1: An Introduction)* (Pantheon Books, New York, 1978).

15 See Foucault's elaboration of the 'docile body', in Foucault, *Discipline and Punish* (1979) 135-141.

16 For the sociology of the paradoxical binding and freeing characters of marriage in modern times, see Anthony Giddens, *The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Societies* (Stanford University Press, Stanford, 1992); Laura Kipnis, *Against Love. A Polemic* (Pantheon Books, New York, 2003); Zygmunt Bauman, *Liquid Love: On the Frailty of Human Bonds* (Polity Press, Cambridge, 2003).

17 For a detailed discussion of cooperative marriage, see Chapters 3, 4 and 5.

18 Mixed-orientation marriage in this thesis refers to the marriage between a man and a woman of different sexual orientation, oftentimes one heterosexual and the other homosexual or bisexual. Some spouses are informed of this discrepancy while others are not.

Some same-sex-oriented people are not willing to put on the straight-jacket at all. However, this does not mean that they simply live naked and unconstrained. The long-sleeved jacket always haunts the lives of the single and those who are in relationships but unmarried. As Dubler points out,

'Marriage continues to regulate the terrain outside of its formal borders, preserving its legal and ideological supremacy as a normative model for all intimate relations and as an arbiter of which relationships deserve legal recognition and protection.'<sup>19</sup>

This is mostly evident in the cases of the separation of same-sex cohabiting couples, where their relationships are judged according to their proximity to or disparity from heteronormative marriage and family life.<sup>20</sup> Such differentiation also makes an appearance where adoption, pension, medical decision and many other issues are concerned.<sup>21</sup>

As with every metaphor, this one has its limits and is open to misunderstanding. Putting on or escaping from a straightjacket seems to assume that the jacket itself is passive and unchanging in the process. However, I will explore how the straightjacket actually responds to its wearers, or how the ideal family trajectory is transformed during people's approximating, parodying, twisting or refusing of it. It should also be stressed that the straight-jacket can have very different looks, given that people can face different sorts of pressure, have widely divergent backgrounds and aspirations, and thus playing with it in various ways.

The multiple aspects of the straightjacket offers a glimpse of the complexity of sexual orientation under Chinese Family Law. The thesis asks: How do same-sex-oriented people in mainland China deal with Family Law? More specifically, how do these persons obey, utilize or resist the law when they arrange their marriage, parenthood and eldercare with or without a heterosexual reproductive family, and why do they do so? How does Family Law shape their identities and family life? What implications do these practices have for queer theory and for LGBT (legal) activism?

Chapters 2 to 6 will also address the following questions: What is the legal environment for same-sex-oriented people living in mainland China? What are the various power tactics the law exercises over homosexuality? How do Chinese same-sex-oriented individuals deal with the marriage pressure? What are their routes to parenthood? How do they live or prepare for their old age? How do gender, sexual and socio-economic differences play out in their family life? What have Chinese lawyers and activists done to change the laws in relation to sexual orientation, under what conditions, and with what effects?

19 Ariela R Dubler, 'In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State' (2003) 112 *The Yale Law Journal* 1641-1715, 1712.

20 See Section 3.2.3.

21 See Chapters 4 and 5.

Before going into the details of these questions, this introductory chapter explains the pluralist approach to (family) law that I take (Section 1.2), the socio-legal theory of legal consciousness (1.3), the methods and ethics of my interdisciplinary research (1.4), as well as giving an overview of this thesis (1.5).

## 1.2 A PLURALIST FRAMEWORK OF FAMILY LAW

For many of the same-sex-oriented Chinese people I have interviewed, the law feels remote. Some told me that as long as they do not commit a crime or commit a traffic violation, they cannot imagine many instances where they would come up against the law. They rarely, if ever, need to consult lawyers. Nor do they believe that laws regarding marriage affect them unless they get married with someone of the different sex, or unless the Chinese authorities open up marriage to same-sex couples.

Socio-legal scholars have been studying this 'gap' between the abstract and lived aspects of law, or the differences between on the one hand written rules and court decisions that are often unintelligible to non-lawyers and, on the other hand, the socio-cultural norms in everyday life. 'Gap' is not an accurate metaphor, however, because law and life are not two wholly separate domains.<sup>22</sup> Moore's concept of 'semi-autonomous social field' could help us understand their inseparability.<sup>23</sup> Nothing in society exists entirely autonomously and in isolation, she argues, so formal legal institutions do not have a monopoly over coercion or inducement, given the existence of various other forms of effective control.<sup>24</sup> In other words, formal legal rules lurk or make themselves felt in social contexts like family, but they do not over-determine the relationships within them.

The common sense, the habitual practices and the conventions in everyday life operate as multiple sources of 'soft law' and remind us to switch our focus from a positivist view of law and take a pluralist approach instead.<sup>25</sup> To that end, we could explore how the official law becomes part of the vernacular in a social context that it is often unrecognized and unquestioned, and reciprocally how some folk languages and beliefs are woven into state law.

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22 For a general introduction to the 'gap studies', see Susan S Silbey, 'After Legal Consciousness' (2005) 1 *Annual Review of Law and Social Science* 323-368; Austin Sarat and Thomas R Kearns, 'Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life', *Law in Everyday Life* (University of Michigan Press, Ann Arbor, 1995).

23 Sally Falk Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 7 *Law and Society Review* 719-746.

24 *Ibid.*, 722.

25 See generally, Sally Engle Merry, 'Legal Pluralism' (1988) 22 *Law and Society Review* 869; Brian Z Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press, New York, 2001).

While putting aside the ‘law-first’ paradigm, one should nevertheless be wary of the danger of uncritically accepting ‘life’ (in its singular form) as an unmediated, coherent and monolithic entity existing in antithesis to ‘law’.<sup>26</sup> This superficially banal point is often neglected in abstract discussions of ‘the life’ of ‘Chinese *tongzhi*’, leaving aside their heterogeneity. The stories I set out in the following chapters will rather present ‘lives’ as being as complicated as ‘laws’.

How can we understand family law in accordance with the pluralist law-in-life perspective as outlined above? And, for that matter, with what historical and political connotations is the word ‘family’ loaded? In modern times there has emerged a dichotomy between family and market, whereby family has long been constructed as a private, emotional, altruistic and status-bond domain, whereas the market is taken to be a benefit-driven, rational and indifferent arena, the two functioning separately but complementarily.<sup>27</sup> In the light of feminist criticism of the division between the public and the private, Halley and Rittich propose the term ‘economic family’, placing familial and contractual relationships on a continuum.<sup>28</sup> They highlight the indivisibility of the relational, the emotional and the economic within familial relationships, and the interlaced connections between family, market and state institutions.<sup>29</sup> ‘Family’ therefore has at once three connotation of kinship (genealogical), home (sentimental), and household (material), connotations also implicit in the multiple meanings of the Chinese word ‘*jia*’.<sup>30</sup>

If we debunk the family/market dichotomy, family law should then no longer be taken as an autonomous domain. The analytical model of Family Law (FL) 1, 2, 3, and 4 proposed by Halley and Rittich could help us to place family law in close relation to other legal fields including, but not limited to, laws that regulate the market.<sup>31</sup> In fact, the boundaries between these ‘fields’ in everyday life are never as hard-and-fast as law-school curricula suggest.

In this framework, FL1 refers to codes, cases and interpretations regulating commonly recognized family-law issues such as marriage, divorce, parenthood, and inheritance.<sup>32</sup> These are the foreground rules of family law

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26 Mariana Valverde, ‘“Which Side Are You On?” Uses of the Everyday in Sociolegal Scholarship’ (2003) 26 *PoLAR: Political and Legal Anthropology Review* 86-98.

27 Janet E Halley and Kerry Rittich, ‘Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism’ (2010) 58 *American Journal of Comparative Law* 753-776, 758.

28 *Ibid.*

29 *Ibid.*

30 For the triple connotation of *jia* (kinship, home and household) and its importance in discussing lesbian family, sociability and belonging, see Antonia Chao, ‘Moving House: The Relational-Materialistic Aspect of Queer Cultural Citizenship’ (2002) 57 *Taiwan: A Radical Quarterly in Social Studies* 41-85.

31 Halley and Rittich, ‘Critical Directions in Comparative Family Law’ (2010).

32 *Ibid.*, 761.

that define and circumscribe domestic relations, which have been artificially segregated from other rules actively playing in the background, namely FL2, 3 and 4.

FL2 encompasses the legal regimes that do not aim to regulate familial relationships but still explicitly use terms describing familial relationships in certain provisions, such as the use of ‘spouse’ or ‘next of kin’ in contract law, property law, employment law, pension law, welfare law, tax law and immigration law.<sup>33</sup> In particular, ‘married’ status implies many rights and obligations other than those in marriage law. Just like Graff points out,

‘Married’ is shorthand taken seriously by banks, insurers, courts, employers, schools, hospitals, cemeteries, rental car companies, frequent flyer programs, and more – a word understood to mean that you two share not just your bedroom but also the rest of your life.<sup>34</sup>

FL3 refers to the legal rules that ‘contribute structurally but silently to the ways in which family life is lived’.<sup>35</sup> For instance, legal rules regarding gender-based retirement ages (females at age 60 and males at age 65) may be one reason why there are more mothers than fathers who become activists helping lesbian and gay youth to come out;<sup>36</sup> the criminalization of hooliganism before 1997 may push gay men into marriage in order to avoid the suspicion;<sup>37</sup> the law forbidding ‘illegal assembly’ may prevent same-sex-oriented people from meeting one another in bars or at social events to establish and develop intimate relationships;<sup>38</sup> the household registration and residence permit system (*hukou*) provides a basis for differential treatment of urban and rural, unmarried and married *hukou* holders;<sup>39</sup> and the fact that the Constitution, including its non-discrimination and human

33 Ibid, 762-764.

34 EJ Graff, *What Is Marriage for?* (Beacon Press, Boston, 1999) 38.

35 Halley and Rittich, ‘Critical Directions in Comparative Family Law’ (2010) 762-764.

36 When asked why PFLAG (parents and friends of lesbians and gays) China (*tongxinglian qinyou hui*) does not have too many male members, the organizer Ah-Qiang told me that it is probably because for lesbian and gay kids in their 20s, their fathers have not yet retired, whereas their mothers have. Therefore, the mothers can have more free time to find information about homosexuality online and to participate in activist trainings and gatherings. Interview with Ah-Qiang, 16 March 2014.

37 More nuances of the crime are discussed in Section 2.1.

38 See Chapters 2 and 6. On the right to ‘come together’ as an inalienable part of the right to establish and develop intimate relationships, see Waaldijk Kees, ‘The Right to Relate: A Lecture on the Importance of “Orientation” in Comparative Sexual Orientation Law’ (2013) *Duke Journal of Comparative and International Law* 161-199.

39 A large number of Chinese people (in particularly rural women) try to achieve upward mobility by marrying urbanites, changing their *hukou* status and thus obtaining different welfare and social status. See e.g., Davin Delia, ‘Marriage Migration in China: The Enlargement of Marriage Markets in the Era of Market Reforms’ (2005) 12 *Indian Journal of Gender Studies* 2-3, 173-188. For *hukou* in relation to socialism, neo-liberalism and sexual outlaws, see Travis Shiu-Ki Kong, ‘Reinventing the Self under Socialism’ (2012) 44 *Critical Asian Studies* 283-308. The benefits and inconvenience of *hukou* will be further discussed in Chapters 3, 4 and 5.

rights clauses, cannot be cited in courts' decisions<sup>40</sup> also severely impedes (sexual) minorities from seeking timely legal remedy for the injustices they endure in familial and social life.

There is a wider range of informal norms, or FL4, that can substantially give meaning to FL1, 2 and 3, influence the ways they work, and simultaneously be reshaped by them.<sup>41</sup> The FL4 norms are not binding laws, but they do guide social life with similar significance.<sup>42</sup> FL4 is theoretically limitless, but some of its norms that keep appearing in my research encounters are worth mentioning here: the pressure on both gay and straight people to have a different-sex marriage and to have children; society's concept of a happy old age that centers around a harmonious three-generation, or even four-generation, family; the gendered expectations in family and at work that constrain both men and women; the Chinese state-party's inclination to maintain stability rather than to protect the legal rights of the marginalized;<sup>43</sup> the long-lasting tension between two fundamental human needs, domesticity versus eros,<sup>44</sup> or the craving for belonging versus the drive for freedom,<sup>45</sup> to name but a few.

One of the most influential FL4 norms this thesis investigates is the 'Catch 22' situation that traps many same-sex-oriented people in the straightjacket. On the one hand, they are facing strong social demands and legal imperatives to 'pass' (i.e., to act as heterosexuals, preferably married ones), if they want to enjoy the legal rights and social respectability attached to marriage.<sup>46</sup> On the other hand, they are pressured to disclose themselves;<sup>47</sup> if they were caught passing, especially passing in a different-sex marriage, there is the possibility, even likelihood, of humiliation and punishment.<sup>48</sup> The pressure to pass suggests that the heteronormative

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40 See Chapter 6.

41 Halley and Rittich, 'Critical Directions in Comparative Family Law' (2010) 765.

42 Tamanaha, A General Jurisprudence of Law and Society (2001) 171-205.

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

44 Stacey has argued that 'all human societies contend with irreconcilable tensions between the domains of eros and domesticity.... Every culture develops family and kinship forms to negotiate inescapable human conflicts between unruly romantic and sexual desires, on the one hand, and timeless human (and social) needs for durable, dependable, intimate relationships and care, on the other.' See Judith Stacey, *Unhitched: Love, Marriage, and Family Values from West Hollywood to Western China* (New York University Press, New York and London, 2011) 5.

45 Bauman, *Liquid Love* (2003) 34.

46 Yoshino, *Covering* (2006).

47 Xiaofei Guo, 'Foreword: You Think What You Think Is What You Think? (你以为是以为的就是你以为的吗?)' in Kenji Yoshino, Jingshu Zhu (tr) *Covering: The Hidden Assault on Our Civil Rights* (掩饰: 同志的双重生活及其他) (Tsinghua University Press, Beijing, 2015). For more discussion of compulsory confession, see Chapter 7.

48 So far there is no law explicitly punishing same-sex-oriented people passing in different-sex marriages, but a court's report recommended for such legal change. See Section 2.2.5 and Chapters 3 and 4.

society does not want to know too much about homosexuality,<sup>49</sup> while the confessional demand insists on knowing more. Sedgwick has summarized the paradoxical operation of homophobia insightfully: the disclosure of one's homosexuality is 'at once compulsory and forbidden'.<sup>50</sup> This double bind thus disqualifies the same-sex-oriented from being honest and integral people in the face of institutions like marriage and family that are designed for those who can proudly announce their affection and sexual preference in public – namely heterosexuals. How one should deal with the desire for family and the same-sex desire thus becomes a perpetual puzzle for many same-sex-oriented people in China, to which there is no answer that can satisfy themselves, their parents, their same-sex partners, their different-sex spouses and their children all at once. This FL4 norm, i.e., the double bind of passing and confessing, will reappear throughout this thesis, as additional straps on the major parts of the straightjacket: marriage, parenthood and eldercare.

However, the analytical tool of FL1, 2, 3 and 4 will not be used mechanically. If we see this framework only as a typology, we may lose grip of the actual operation of these multi-level rules as a constantly changing assemblage.<sup>51</sup> These acronyms will mainly serve as a key reminder: family law has many aspects; it permeates our everyday lives, in language or in silence, by means of force or seduction, so that the law is not as remote and solemn as it seems at first glance. In the following text, when I used 'Family Law' with its first letters capitalized, it implies the multiplicity of it, whereas 'family law' in small letters will be used to refer to the positivist FL1. Note that in China there is not a formal code named Family Law as such. The next section will further probe into how people perceive and deal with the multi-facet laws.

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49 See Chapter 2, and Cheshire Calhoun, *Feminism, the Family, and the Politics of the Closet: Lesbian and Gay Displacement* (Oxford University Press, New York, 2000); Wei Wei, 'From Symbolic Annihilation to Censored Publicity: The Representation of Homosexuality in the Film *If You Are the One* (从符号性灭绝到审查性公开: 《非诚勿扰》对于同性恋的再现)' (2010) 2 *Open Times* 84-99.

50 Eve Kosofsky Sedgwick, *Epistemology of the Closet* (University of California Press, Berkeley and Los Angeles, 1990) 70.

51 For 'assemblage', see Gilles Deleuze and Felix Guattari, *A Thousand Plateaus* (University of Minnesota Press 1987) 4; Jasbir Puar, 'Rethinking Homonationalism' (2013) 45 *International Journal of Middle East Studies* 336-339, 337.

### 1.3 LEGAL CONSCIOUSNESS

We may know nothing about the law until we find out what it can and cannot do.<sup>52</sup> One way to learn is to observe how the law makes people obey, use, manipulate, circumvent, breach or oppose itself. This means that, when studying law, in addition to the black letters of the law and the landmark decisions, we should also examine how the law plays a role in constructing and constraining our daily lives, and how ordinary people deal with and reshape the various legal norms. These are what Marshall and Barclay call the ‘pull and push’ of legal ideas.<sup>53</sup> In that respect, legal consciousness theory that originates from socio-legal studies in the United States can offer us some epistemological and methodological insights.<sup>54</sup>

The different legal-political contexts of the term ‘legal consciousness’ need some clarification. In China’s official discourse, legal consciousness (*falv yishi*) is often understood as people’s trust and faith in law and, especially, the sense of needing to be law-abiding in everyday life. It also refers to the awareness of the process of bringing disputes to courts or arbitrators, instead of resorting to uncivil and/or unlawful means of settlement. This term has been widely used in the party-state’s campaigns of ‘dissemination of law (*pufa jiaoyu*)’<sup>55</sup> and ‘sending law to the countryside (*song fa xiaxiang*)’.<sup>56</sup> For instance, according to the definition given by Chinese National People’s Congress, legal consciousness means,

‘the totality of people’s thoughts, opinions and mentality about law and legal phenomena.... It cannot come into being automatically, but should be cultivated on purpose.’<sup>57</sup>

It continues,

‘to cultivate legal consciousness, three aspects of work must be emphasized: 1. to propagandize the rule of law...; 2. to build the legal infrastructures, making sure “there must be laws to go by, the laws must be observed and strictly enforced, and lawbreakers must be prosecuted”, so as to build up the authority of the law; 3. to disseminate the knowledge about law. In addition, we should train lawyers, conduct legal research, and direct the construction of law with scientific legal theories.’<sup>58</sup>

52 Without going into details, this idea is drawn from Deleuze and Guattari’s discussion of ‘what a body can do’, see Deleuze and Guattari, *A Thousand Plateaus* (1987) 150. See also, Ian Buchanan, ‘The Problem of the Body in Deleuze and Guattari, Or, What Can a Body Do?’ (1997) 3 *Body and Society* 73-91.

53 Anna-Maria Marshall and Scott Barclay, ‘In Their Own Words: How Ordinary People Construct the Legal World’ (2003) 28 *Law and Social Inquiry* 617-628.

54 For literature review of legal consciousness studies, see Silbey, ‘After Legal Consciousness’ (2005). Duncan Kennedy produced one of the earliest accounts of American legal consciousness in 1980, in ‘Two Globalizations of Law and Legal Thought: 1850–1968’ (1980) 26 *Suffolk Law Review*, 631–679.

55 See Mary E Gallagher, ‘Mobilizing the Law in China: “Informed Disenchantment” and the Development of Legal Consciousness’ (2006) 40 *Law and Society Review* 783-816.

56 Suli Zhu, *Sending Law to the Countryside: Research on China’s Basic-Level Judicial System* (Springer, Singapore, 2016).

57 ‘What is Legal Consciousness and How is it Developed?’, National People’s Congress of China, 17 December 2000, at [www.webcitation.org/6nTvKQ8ai](http://www.webcitation.org/6nTvKQ8ai).

58 *Ibid.*

From the state's perspective, legal consciousness must be brought forth top-down, through education and propaganda.<sup>59</sup> Its aim is to create more docile (both tame and useful)<sup>60</sup> citizens through the ideologically-driven aspiration of rejuvenating a civilized, modernized, rule-of-law China. In this thesis, however, the idea of legal consciousness is not limited to the obedient mental state of Chinese citizens. It is an ongoing dynamic process of collective construction of legalities, i.e., of making sense of what is legal and what is not. For the purpose of this thesis, 'legalities', when used in the plural form, is broader than the binding effects of state law; it refers to the meanings, sources of authority, and cultural practices that are commonly recognized as legal, regardless of who employs them or for what ends.<sup>61</sup> Although legal consciousness in the latter sense has become a classic analytical tool in Western legal anthropology, it is not yet elaborated in Chinese academic literature. This is one of the contributions this thesis attempts to make.

In their renowned book *The Common Place of Law*, Ewick and Silbey have identified three schemas of ordinary people's legal consciousness: 'before' (obeying or bowing to) the law, 'with' (using or playing with) the law, and 'against' (avoiding or resisting) the law.<sup>62</sup> Before-the-law legal consciousness treats the law as a series of permissions and prohibitions with transcendental majesty, similar to Foucault's 'juridical power'<sup>63</sup>. With-the-law suggests a utilitarian view of the law as a game, a terrain for tactical engagement through which people marshal a variety of social resources to achieve strategic goals.<sup>64</sup> Together the two constitute law's hegemonic status: when the law is deemed both universal and particular, both sacred and malleable, it becomes more convincing and prevailing.<sup>65</sup> The against-the-law schema, on the other hand, generates counter-hegemonic forces. It can take various forms, including 'pilfering, violence or threats of violence, tricks, institutional disruptions, foot-dragging, humor, storytelling and gossip'.<sup>66</sup> These tactics are often employed by those who do not benefit from bowing to the law's authority or playing the law's game, and this applies especially to the socially marginal.<sup>67</sup>

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59 For China's aspiration to become a rule-of-law state and its half-heartedness, see Lisa Rofel, *Desiring China: Experiments in Neoliberalism, Sexuality, and Public Culture* (Duke University Press 2007); Liebman, 'Legal Reform: China's Law-Stability Paradox' (2014).

60 See Foucault, *Discipline and Punish* (1979) 135-141.

61 See Susan S Silbey and Patricia Ewick, *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press 1998) 22.

62 Silbey and Ewick, *The Common Place of Law* (1998) 57-222.

63 Michel Foucault, *Power/knowledge: Selected Interviews and Other Writings 1972-1977* (Pantheon Books 1980) 88.

64 Silbey and Ewick, *The Common Place of Law* (1998) 108-164.

65 Ibid.

66 Patricia Ewick and Susan Silbey, 'Narrating Social Structure: Stories of Resistance to Legal Authority' (2003) 108 *American Journal of Sociology* 1328-1372, 1336.

67 Silbey and Ewick, *The Common Place of Law* (1998) 165-222.

The last schema has been further developed in Harding's study of the legal consciousness of lesbians and gay men in the UK.<sup>68</sup> She differentiates three types of resistance: stabilizing resistance (as an inherent part of power relations), moderating resistance (partly reducing the effect of power), and fracturing resistance (breaking the flow of power).<sup>69</sup> Harding finds that the last type is that most commonly thought of in terms of resistance, but in reality, it is the least commonly practiced.<sup>70</sup>

In fact, if we come to terms with the idea that 'resistance hardly ever has a straightforward public presence; it is rather duplicitous, ambiguous, even devious',<sup>71</sup> then being before, with or against the law may not differ as starkly as they do in theory. Arguably, obeying the rules (or pretending to do so) and playing the game can well be subtle yet powerful means of resistance, much like the canny tactics of 'guerrilla warfare'<sup>72</sup> or 'infrapolitics',<sup>73</sup> as illustrated by many of the stories told in later chapters. Of course, these vague forms of resistance do not come without cost. As Wieringa points out, 'at one end of the sliding scale of subversion, the line between defiance and defeat is thin'.<sup>74</sup> This is in particular evident in the controversial practices of same-sex-oriented people entering into cooperative and 'fraudulent' marriages. Despite the turbulence they cause to the institution of marriage, these people are often scolded as complicit with heteronormativity and thus sabotaging the gay rights movement.<sup>75</sup> Legal consciousness theory may help us understand the complexity of their lives and the assimilation/subversion debate.

To date literature on the legal consciousness of same-sex-oriented people per se is thin on the ground, and even less has been written about non-Western societies. Baumle and Compton have conducted comprehensive research into how LGBT individuals navigate the law as part of their family decision-making in the US where the 'legal-friendliness' varies from one jurisdiction to another.<sup>76</sup> A few studies have focused on same-sex marriage rituals in lesbian and gay communities and how they construct

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68 Rosie Harding, *Regulating Sexuality: Legal Consciousness in Lesbian and Gay Lives* (Routledge, Oxon and New York, 2011).

69 Ibid, 13.

70 Ibid, 48.

71 María Lugones, *Pilgrimages/Peregrinajes: Theorizing Coalition Against Multiple Oppressions* (Rowman and Littlefield, Lanham, 2003) x. For an elaboration of multiple tactics of resistance, see also, Chela Sandoval, *Methodology of the Oppressed* (University of Minnesota Press, Minneapolis and London, 2000); Wieringa, *Heteronormativity, Passionate Aesthetics and Symbolic Subversion in Asia* (2015).

72 Sandoval, *Methodology of the Oppressed* (2000) 58.

73 James C Scott, *Domination and the Arts of Resistance: Hidden Transcripts* (Yale University Press, New Haven and London, 1990) 183-201.

74 Wieringa, *Heteronormativity, Passionate Aesthetics and Symbolic Subversion in Asia* (2015) 225.

75 See Section 3.3.

76 Amanda K Baumle and D'Lane R Compton, *Legalizing LGBT Families: How the Law Shapes Parenthood* (New York University Press, New York and London, 2015).

legalities despite the lack of formal legal recognition.<sup>77</sup> Some discuss people's attitudes towards marriage vis-à-vis registered partnership or informal cohabitation.<sup>78</sup> Other scholars approach legal consciousness in the light of queer theory, caution the paradoxical role of law in both legitimization and further marginalization, and call for a more critical engagement with law and the relevant cultural codes.<sup>79</sup>

Scholars have also pointed out several limitations of the legal consciousness theory,<sup>80</sup> among which two are worth noting in the current research project. Firstly, the descriptive nature of legal-consciousness studies may sideline the very production of legal consciousness, and therefore it is not made clear where one's legal consciousness, and more profoundly, one's self-consciousness as a lawful citizen, comes from.<sup>81</sup> The notion 'consciousness' presupposes a 'prior, volitional subject' who can freely choose to perform in certain ways, while ignoring the performative construction of this very subject.<sup>82</sup> To counter this individualistic tendency, I will pay more attention to the intersecting socio-economic structures that have produced various thoughts about law, and ultimately, produced historically and geographically specific subjects like *tongzhi*, *tongqis*, and PFLAGs (Parents and Friends of Lesbians and Gays),<sup>83</sup> as well as their desires. Therefore, as with the use of FL1, 2, 3 and 4, I will not just label each case with one or more types of legal consciousness or merely show the diversity of individual psychological states when dealing with law-related events. What I would like to highlight is how Chinese Family Law has shaped these identities, how life arrangements are simultaneously stimulated and restrained, and how people may resist and reformulate these norms.

Another closely related critique is that the volitional idea of legal consciousness obscures the power of the subconscious or unconscious mind.<sup>84</sup> To explore the legal sub- or unconsciousness from a psychoanalyti-

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77 Kathleen E Hull, 'The Cultural Power of Law and the Cultural Enactment of Legality: The Case of Same-Sex Marriage' (2003) 28 *Law and Social Inquiry* 629-657; Nancy Nicol and Miriam Smith, 'Legal Struggles and Political Resistance: Same-Sex Marriage in Canada and the USA' (2008) 11 *Sexualities* 6, 667-687, 667.

78 Alison Rolfe and Elizabeth Peel, "'It's a Double-Edged Thing': The Paradox of Civil Partnership and Why Some Couples Are Choosing Not to Have One' (2011) 21 *Feminism and Psychology* 317-335; Rosie Harding, "'Dogs Are 'Registered', People Shouldn't Be": Legal Consciousness and Lesbian and Gay Rights' (2006) 15 *Social and Legal Studies* 511-533.

79 Lisa C Bower, 'Queer Acts and the Politics of "Direct Address": Rethinking Law, Culture, and Community' (1994) 28 *Law and Society Review* 1009-1034; Arvind Narrain and Alok Gupta, 'Introduction' in Arvind Narrain and Alok Gupta (eds), *Law Like Love: Queer Perspectives on Law* (Yoda Press, New Delhi, 2011) xxii.

80 For a summary of the critiques, see Harding, "'Dogs Are 'Registered', People Shouldn't Be'" (2006) 515-517.

81 *Ibid.*, 516.

82 Judith Butler, 'Imitation and Gender Insubordination' in Diana Fuss (ed), *Inside/Out: Lesbian Theories, Gay Theories* (Routledge, New York and London, 1991) 13-32, 24.

83 For more discussion of *tongqi* and PFLAG parents, see chapters 3, 4 and 5.

84 Harding, "'Dogs Are 'Registered', People Shouldn't Be'" (2006) 516.

cal perspective is beyond the scope of this research, but we could at least pay more attention to the productive role of feelings and emotions, as suggested by many recent critical works.<sup>85</sup> Ideology works best via the proliferation and circulation of emotions rather than ideas;<sup>86</sup> it is often emotions that bring some people into alignment and exclude others;<sup>87</sup> they mediate the psychic and the social, the individual and the collective.<sup>88</sup> Therefore, another theoretical contribution this thesis tries to make is to connect the dots between legal consciousness and one's less articulable feelings. Some of the most intense emotions circulating among Chinese same-sex-oriented people include stress, shame, guilt, anxiety, as well as a certain carefreeness, which will make themselves felt by the readers in subtle ways in the chapters that follow. The concluding chapter develops further this link between legal consciousness and feelings.

#### 1.4 QUILTING LAW AND STORIES: SOURCES AND METHODS

Being privileged to be affiliated to both a law school and an anthropological department, I am constantly fascinated by legal reasoning, story-telling and the way they overlap. Law and Anthropology, when juxtaposed, seem to suggest two separate fields that only occasionally receive an interdisciplinary examination. This thesis nevertheless tries to resist the binaries of reason/sense, doctrinal/empirical, and rigid/freeform that at first sight encapsulate the disciplinary divisions between law and anthropology. What I believe is that 'the life of law is both logic *and* experience',<sup>89</sup> so neither law nor life stories would be fully comprehensible without the other.

Therefore, I adopt a 'quilting' approach towards researching and writing, stitching different discourses together, not privileging either the 'legal'

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85 For the readability of this thesis, I will not differentiate emotions and feelings, and will not elaborate the affect theory here. The most relevant implication of affect studies to this thesis is the non-individualistic understanding of emotions, i.e., emotions are not what one has; emotions do things. See Lauren Berlant, *Cruel Optimism* (Duke University Press, Durham and London, 2011); Gilles Deleuze, *Spinoza: Practical Philosophy* (City Lights Books, San Francisco, 1988).

86 Yin-Bin Ning and Josephine Chuen-Juei Ho, *People in Trouble: Depression, Emotion Management and the Dark Side of Modernity* (民困愁城: 忧郁症、情绪管理、现代性的黑暗面) (Taiwan: A Radical Quarterly in Social Studies, Taipei, 2012).

87 Sara Ahmed, 'Affective Economies' (2004) 22 *Social Text* 117-139.

88 Ibid.

89 Holmes has argued eloquently that 'the life of the law has not been logic: it has been experience', and that 'life of the law is always already animated by prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with the fellow-men'. Oliver Wendell Jr Holmes, *The Common Law* (Project Gutenberg 1881) 1. Developed from Holmes' famous quote, Silbey and Ewick emphasize the importance of both logic and experience. Susan S Silbey and Patricia Ewick, 'The Double Life of Reason and Law' (2003) 57 *University of Miami Law Review* 497-512, 501.

or the 'social'.<sup>90</sup> Unlike delicate embroidery, this socio-legal patchwork may not have a neat appearance; yet as all the patches are pieced together and sewn into an ensemble, so that they are not isolated. In this section, for the purpose of structural clarity, I explain the 'legal' and 'anthropological' methods separately, but we should pay more attention to their interplay in real-life cases.

#### 1.4.1 The Legal Research

The primary sources of the doctrinal legal research include the Chinese Constitution, national and provincial legislation, binding legislative and juridical interpretations of law, central and local administrative regulations, court cases, and specific administrative decisions. When an international and/or comparative perspective is needed, I refer to international treaties, principles, resolutions of the United Nations, decisions of international or regional courts and human rights mechanisms concerning sexual orientation, as well as statutes and cases in other jurisdictions. I rely on the authorized digital versions of these texts. The unofficial English translation of some Chinese laws can be found online, but for the purpose of accuracy, I may use it with minor adjustments. The primary legal resources also consist of some materials I collected in the field, such as the prenuptial contracts between cooperative spouses, the financial agreements among cohabiting same-sex couples, and the written submissions and evidence of the parties in lawsuits. The secondary legal sources used in this thesis are mainly treatises and periodical articles.

In order to have an overview of Chinese statutory law on homosexuality, I searched for all national and regional legislations and administrative regulations with the key words 'homosexuality (*tongxinglian*)', 'same sex (*tongxing*)' and 'sexual orientation (*xing quxiang* or *xing qingxiang*)' on the database Chinalawinfo. It turns out a small number of the laws explicitly include these words. As shown in the following chapters, the legal restrictions on same-sex-oriented people are mostly imposed in a more ambiguous fashion.

The same key-word searches have been done on the published court cases in the official database China Judgement Online, as well as in unofficial ones such as ItsLaw and OpenLaw. As there have been thousands of court cases including these words, I selected 39 typical cases on different subject matters, such as divorce (property and custody), separation of same-sex couples, same-sex assault, group sex, blackmail, same-sex prostitution, trademarks, civil organization registration, etc. Most of these collected cases are decided after 2010, since the judgments before are less detailed. The

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90 The quilting approach is inspired by Paula Saukko, 'Between Voice and Discourse: Quilting Interviews on Anorexia' (2000) 6 *Qualitative Inquiry* 299-317, which cites Deleuze and Guattari, *A Thousand Plateaus* (1987) 474.

wide variety of legal issues in relation to homosexuality give us a broader picture in which the family life of Chinese same-sex-oriented persons is situated.

Some of the FL 2 and 3 cases are analyzed in Chapters 2 and 6, and more FL 1 cases in Chapters 3, 4 and 5. In addition, I sampled randomly 40 'ordinary' cases since 2010 in which there is no explicitly same-sex-oriented party. Some of these cases are briefly referred to, so as to show the common-place legal practices concerning marriage, parenthood and eldercare. Such comparison between the 'gay' cases and presumably 'straight' ones can help us see more clearly to what extent Chinese laws and courts take sexual orientation into account, and when they do, whether this is done with bias.

#### 1.4.2 The Fields

The stories in this thesis are mainly collected during the fieldwork I conducted in China from March to October 2014, followed by a number of updates and follow-up visits over the next two years. After a pilot study in November 2013, I first decided to do fieldwork in Guangzhou, the capital city of a southern coastal province Guangdong. This metropolis accommodates numerous same-sex-oriented people from all over China, with a great diversity of identities and lifestyles. Moreover, since the 2000s, this city has also witnessed the emergence of China's LGBT and young<sup>91</sup> feminist activism. Many LGBT organizations are thriving there, including PFLAG China (*Tongxinglian Qinyou Hui*, an NGO founded in 2008 providing peer support for the parents of gay or lesbian children), Zhitong Guangzhou LGBT Centre (the first local NGO providing an LGBT hotline service, which it has done since the early 2000s and is now also offering HIV-AIDS-prevention outreach and LGBT cultural events), GirlFriend (a lesbian-feminist group), Gay-Straight Alliance (a group aiming to ensure more heterosexuals have a more complete picture of the real life of LGBTs), and Tong Cheng LGBT Youth Education Center (an organization working with high-school or college teachers to give LGBT-friendly sex education lessons), to name but a few.

During my first month in Guangzhou, I liaised with these NGOs and their activists, who introduced me to a number of same-sex-oriented people and their parents living in or near the city, whom I talked with at some length and interviewed. Meanwhile, I worked as a volunteer at some of their weekend events as reciprocity, which also gave me the opportunity to find more respondents by means of snowball sampling. This was helpful in the early stages, but was also limited because the respondents I found via the activist 'gatekeepers' were more likely to be homogeneous.

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91 About the 'youthfulness' of feminist activism since the 2010s, and the continuity and rupture with previous state-sponsored feminism, see Wen Liu, Ana Huang and Jingchao Ma, 'Young Activists, New Movements: Contemporary Chinese Queer Feminism and Transnational Genealogies.' (2015) 25 *Feminism and Psychology* 1, 11-17.

After two months, I decided not to limit my field to the city of Guangzhou, considering that many of the respondents I contacted online expressed the wish to talk with me face-to-face, and that many LGB-relevant (legal) events in other places were worth participating in. My aim was not simply to widen the variance in gender, age, class or region in my sample – after all, difference cannot be enumerated by simply enlarging the pool. I travelled because I preferred to ‘follow’ my research in a leisurely manner rather than to ‘lead’ it, in light of the actor-network theory (ANT):

‘Craft research is shaped by the patterns of interaction and practice that it’s immersed in. You don’t assume too much. You let the research unfold. ... It would unfold uncertainly. It would be sensitive to ethnographic surprises. It wouldn’t be highly programmed.’<sup>92</sup>

Therefore, leaving room for surprise, I became a participant observer in story-telling meetings (*ken tan hui*) organized by PFLAG in Kunming (capital city of Yunnan Province in southwestern China) and Guangzhou, in the LGBT camp in the Sex Expo in Xi’an (capital city of Shanxi Province in central China), in an *elderly lesbian oral history* working group meeting in Chengdu (Sichuan Province in southwestern China), in some informal gatherings of people in cooperative marriages in Shenyang (Liaoning Province in northeastern China), and in a caucus meeting in Beijing aiming to discuss litigation strategies for an LGBT NGO registration case (some activists were arrested the day before and released 24 hours later). I also went to a village in southern China to assist a *tongqi* with her divorce litigation, and another village to interview two elderly unmarried women living together for more than half a century. These widely differing stories will be added to the quilt in later chapters, and the connections between them will be reconsidered in the conclusion.

Meanwhile, I have also spent plenty of time on the virtual ‘field’. I joined three *tongzhi* QQ<sup>93</sup> groups, two *tongqi* groups and one PFLAG group for the purpose of observing participants online, so as to get a sense of the issues that were important to a wider range of people than those who show up and speak up in offline events. I found a number of respondents for interviews via these groups. I also surfed frequently and got inspiration from some discussions on other online forums such as *tianya*<sup>94</sup>, or the *tongqi*,

92 John Law and Vicky Singleton, ‘ANT and Politics: Working in and on the World’ (2013) 36 *Qualitative Sociology* 4, 485-502, 488. For more about the ANT, see Bruno Latour, *Reassembling the Social: An Introduction to Actor-Network Theory* (Oxford University Press, New York, 2005).

93 QQ is an instant-message software that is most widely used in China, which can be accessed on both personal computers and smart phones.

94 *Tianya* is one of the largest online forums that have various sections, including one called ‘on the same road’ (*yilu tongxing*). The word ‘same’ (*tong*) serves as a cue for homosexuals (*tongxinglian* or *tongzhi*), at [www.webcitation.org/6qlpP4wCS](http://www.webcitation.org/6qlpP4wCS). For the use of the word ‘tong’ in many other LGBT organizations, see Yu Qi, ‘Identity Terms and Organizing for Women in Same-Sex Relations in Mainland China’ (Degree Thesis of Master of Arts in Gender Studies of Central European University, 2013).

cooperative marriage and feminist 'web bars' on Baidu<sup>95</sup>. While acknowledging that online and offline stories are differently situated and produced, we should nevertheless try to move beyond the dualistic thinking which holds that offline provides the context while online is the phenomenon'.<sup>96</sup> Instead, Internet material encompasses both texts and interactive sites.<sup>97</sup> I will not give more credits to stories told face-to-face than down-the-line or the other way around, but will read these narratives with and against one another, while paying attention to the socio-legal-emotional contexts that give meanings to them.

### 1.4.3 Sampling Respondents

When designing this project in early 2013, and with a narrow definition of family law in mind, I planned to find out how Chinese lesbian and gay couples in relatively stable relationships make legal arrangements about family issues such as communal property, inheritance, insurance and parental responsibility, and how lawyers would advise them. Soon after I started my fieldwork, I realized these particular aspects of same-sex partnership, including the very awareness and ability to consult a lawyer about property and parenthood, might have narrowed my focus onto people who are already relatively resourceful. This is not to say that lower-class people do not directly engage with the law and lawyers, but only looking at stable cohabitation and its legal arrangements would miss a wider variety of lived experiences, legalities and legal consciousness.

Therefore, while I was still looking for long-term same-sex couples as my respondents, I did not discount other stories, stories about coming out, being single, hooking up, breaking up, finding cooperative-marriage partners, conducting 'marriage fraud', making friends inside and outside the LGBT communities, making a living on the farm, surviving in the metropolises, and so on. It turns out that many insights have come from stories that superficially seemed 'irrelevant' to family and to law.

If the legalities, the legal subjects and their legal consciousness are all plural, then sampling respondents based on identities like lesbian, gay, bisexual, and *tongqi* is insufficient, if not futile. How could I find those who do not identify with, or do not even know these labels? Is it not simply impossible? Undeniably, there was a bit of luck. For example, I first met a rural-to-urban migrant worker Hua, who self-identifies as a *lala* (similar to

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95 Anyone can establish a virtual bar on Baidu concerning a wide range of topics (except for anti-state, anti-social, violent, or explicitly pornographic ones), and like other BBS, people of the same or opposing interest can post and make comments. Many same-sex-oriented people and *tongqis* 'discovered' their identities and found their communities there. See [www.webcitation.org/6qlpQbLvN](http://www.webcitation.org/6qlpQbLvN).

96 Shani Orgad, 'From Online to Offline and Back: Moving from Online to Offline Relationships with Research Respondents' in Hine Christine (ed), *Virtual Methods: Issues in Social Research on the Internet* (Berg, Oxford, 2005) 51-65, 64.

97 Christine Hine, *Virtual Ethnography* (Sage, London, Thousand Oaks, New Delhi, 2000).

lesbian).<sup>98</sup> If Hua had not told me that she believed there were two elderly ‘lalas’ in her hometown, I would not have met these two life-long cohabitantes in a remote village, whose relationship does not have any name in the glossary of contemporary lesbian and gay studies.<sup>99</sup> However, it was more than a lucky coincidence, because Hua, the QQ software we both used, a certain degree of rural-urban mobility in China and the rising lesbian/*lala* discourses are all inevitable elements that prompted our encounter.

Sampling the silent majority is even more difficult and ethically thorny. If, as estimated, there are 14 million mixed-orientation marriages in China,<sup>100</sup> how could I even approach the unwitting wives without risking a fundamental breach of research ethics of ‘doing no harm’? If most same-sex-oriented men, especially the older generations, had entered into different-sex marriages without a clear gay identity, thus without an intention of ‘straight-passing’, how can we ask their wives to tell us their experiences and feelings about a ‘fraudulent’ marriage? In such cases, are these women ‘*tongqis*’ and their husbands ‘gay’ or ‘bisexual’ at all? These tricky questions will be further discussed in Section 1.4.5 about research ethics, and in more detailed stories in the next chapters.<sup>101</sup>

#### 1.4.4 Interviewing

During the fieldwork, I conducted semi-structured interviews instead of asking a list of prepared questions. When talking to my respondents, I had key words like ‘marriage’, ‘parenthood’, ‘eldercare’ and ‘law’ in mind. The questions I raised were often improvised in response to their respective words and stories. I did not fully adopt the grounded-theory approach,<sup>102</sup> since I had already had a preliminary research plan in mind. However, the idea of it helped to alleviate my concerns about the ‘usefulness’ of the stories and allowed the conversations to flow more naturally.

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98 For the inaccuracy and the interpretive openness of translation, especially in relation to gender, sexuality and post-colonial theories, see A Ka Tat Tsang and P Sik Ying Ho, ‘Lost in Translation: Sex and Sexuality in Elite Discourse and Everyday Language’ (2007) 10 *Sexualities* 5, 623-644; Liu, Karl and Ko, *The Birth of Chinese Feminism* (2013) 11.

99 More of their stories can be found in Sections 4.3.3 and 5.3.1.

100 Minghua Liu and others, ‘Estimation on the Numbers of Chinese Homosexuality and People with Same-Sex Sexual Behaviors and Related Female Group’ (中国同性恋者、同性性行为者和相关女性群体人口数值估测) (2013) 53 *Journal of Chemical Information and Modeling* 117-121.

101 The method of ‘inconvenience sampling’ is discussed in a paper in Chinese, see Jingshu Zhu, ‘Inconvenience Sampling: Methodological Implications of the Research on “Gay Frauds” in Mainland China (不方便抽样:中国大陆“男同骗婚”研究的方法论启示)’ (2016) 10 *China Youth Study* 30-35.

102 See e.g., Barney Glaser and Anselm Strauss, *The Discovery of Grounded Theory* (Aldine 1967); Kathy Charmaz, *Constructing Grounded Theory: A Practical Guide through Qualitative Analysis* (SAGE Publications, London, Thousand Oaks, New Delhi, 2006).

Conducting interviews on legal consciousness requires certain techniques. For many people, law is understood as simply a series of prohibitions, punishment, formalities, all rather removed from everyday life.<sup>103</sup> Therefore, it would be less fruitful to ask straightforwardly about their perception and use of 'law' than to encourage them to talk about life events, thus letting their legal consciousness emerge organically. For instance, I often started my interview with a lesbian-identified person by asking how she came to be aware of her same-sex orientation, how she met her partner(s), what she did on a typical weekday, whether she had come out to her parents, whether she faced the pressure to marry or to have children, and how she envisaged her life in five or ten years. Most respondents could weave rich stories around these questions, and even if they did not directly use or talk about the word 'law', it is still possible to find out how Family Law is affecting their lifestyles and important decisions, and how they may subtly change the law's meaning in the course of arranging their (non)normative (non)familial lives.

The interviews usually lasted for one to two hours. I interviewed some people more than once and spent up to a week living with a number of others. Some of my respondents and I later became good friends and they have been updating me about their life changes and thoughts constantly. With some, I have developed a strong sense of kinship.<sup>104</sup> At times the interviews were not clearly different from informal chatting, especially when I decided not to use a voice recorder so as to make the respondents less cautious about their words. In other occasions, even a notebook and a pen can be intrusive and distracting (in a gay cruising park for instance), so I relied only on my memory, which made the conversations easier, at the expense of some degree of accuracy when I quote them. In such cases, I immediately wrote down the important words and observations after we spoke. I use *Atlas.ti*, a qualitative software package, to manage my interview transcripts and field notes, but I try not to use it to categorize and code the before-, with- or against-the-law legal consciousness mechanically.<sup>105</sup>

Altogether, I have formally or informally interviewed 51 same-sex-oriented people, not all of whom self-label as gay, lesbian, *tongzhi*, *lala*, queer/*kuer*, etc. Among them, 23 are men, 26 women and two self-identify

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103 See above, Section 1.2.

104 For an elaboration of 'research kinship', see Mathias Detamore, 'Queer (y)ing the Ethics of Research Methods: Toward a Politics of Intimacy in Researcher/Researched Relations' in Kath Brown and Catherine Nash (eds), *Queer Methods and Methodologies: Intersecting Queer Theories and Social Science Research* (Ashgate Publishing Company, Surrey and Burlington, 2010).

105 Silbey opposes simply coding legal consciousness, arguing instead for using these schemas to 'collect and organize the materials out of which people construct their accounts of law... Legal consciousness, in this account, consists of mobilizing, inventing, and amending pieces of these schemas.' See Silbey, 'After Legal Consciousness' (2005) 358.

as transgender.<sup>106</sup> I also talked to eight PFLAG parents (who are presumably straight<sup>107</sup>) and seven lawyers (some are openly gay or *lala*). Numerous informal chats with activists and short conversations with same-sex-oriented people in bars and cruising parks at night were of great inspiration, too. All the encounters have shaped the ideas set out in this thesis, although I can only elaborate a few of them. My concern is less about being unable to present the panorama of sexual orientation law and legal consciousness in China. Instead, I am more afraid of reducing these vibrant and vital life stories into separate ‘case studies’, ‘examples’ or ‘counterexamples’ that prove or falsify a certain universal progression of ‘gay rights’, yet not challenging the legitimacy of its very universality. My socio-legal analysis of the fragmented snapshots of the respondents’ lives can hopefully allow their experiences and views to dialogue with each other, so as to give us a glimpse of the incongruities of a world much messier than we might wish it to be.

#### 1.4.5 Research Ethics

My research has been guided by the general ethical principle ‘first do no harm’<sup>108</sup>. The difficulty is, however, future harm is never wholly predictable at the time of the interview, and the boundaries between harm, conflict and discomfort may vary from person to person.<sup>109</sup> Therefore, even if a researcher has followed the methodological guidelines on ‘mutual rapport’ and ‘informed consent’<sup>110</sup>, she has no grounds for complacency about her ethicality.<sup>111</sup> A lot more should be thought and done during and after the

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106 Transsexual or transgender subjects may self-identify as man or woman, but these two respondents do not.

107 This assumption itself is interesting to notice, as if when one is seen as primarily a parent in China, this person is by default heterosexual, and his or her sexuality becomes much less meaningful than their familial and social status. In fact, one PFLAG parent has informed me of some anecdotes that several parents in their group are also *tongxinglian*. These rumors are often neglected or denied in the official accounts of the PFLAG, partly due to such a heterosexual assumption of a parent. More importantly and more subtly, the denial might be because these ‘exceptional’ parents will complicate PFLAG’s principled argument – they argue that homosexuality is genetic (thus natural and immutable) but not hereditary (thus not the fault of the parents, and no worries for the future kids of gay people). This thesis cannot dig further into the (sexual) life of these ‘straight’ parents, but the longing for normalcy of many Chinese parents and their same-sex-oriented children will be presented in more arguments and thoughts like this.

108 Peter Allmark and others, ‘Ethical Issues in the Use of In-Depth Interviews: Literature Review and Discussion’ (2009) 5 *Sheffield Hallam University Research Archive* 48-54.

109 The unpredictability of harm in research encounters is discussed in J O’Connell Davidson, ‘If No Means No, Does Yes Mean Yes? Consenting to Research Intimacies’ (2008) 21 *History of the Human Sciences* 49-67. For the discussion of harm in personal relationships in general, see Sarah Schulman, *Conflict Is Not Abuse: Overstating Harm, Community Responsibility, and the Duty of Repair* (Arsenal Pulp Press 2016).

110 Ron Iphofen, *Research Ethics in Ethnography/Anthropology* (European Commission, DG Research and Innovation, 2013) 26-34.

111 Davidson, ‘If No Means No’ (2008) 65.

fieldwork to make sure that the respondents' privacy and security remains the priority. In many cases, therefore, I have to tell a much less vivid story here than what was told to me.

In the field, I adjusted the manner (written or oral) and timing (from the very beginning or retroactively) of information-giving and consent-requesting depending on the topics and the particular circumstances. I also bore in mind that consent should be an ongoing and dynamic process, and that it could be withdrawn before a paper is published.<sup>112</sup> Such ethics are consistent with the ontology and epistemology that this thesis follows: if we believe one's subjectivity is constantly re-negotiated in the process of knowing others and being known, then one's willingness to be written down may reasonably change in time. There are a few cases where the respondents ceased to consent to my using their stories during the writing process, which I have fully respected.

It is not feasible to double check with every respondent (some of whom I have lost contact with) that I did not misunderstand them in my thesis, but I did do so with people I refer to substantially. Some would ask me to emphasize or trivialize certain words, which I followed when I found it reasonable. On the other hand, however, a researcher should not refrain from expressing different opinions than what the respondents expected her to say, because being ethical is not equal to being a pleaser to all parties, especially when discussing controversial topics.<sup>113</sup>

As much as informed consent helps to avoid future disputes, we should not assume its ethical supremacy. Obtaining consent from those who are referred to in other people's narratives is oftentimes impractical, undesirable, if not unethical. A typical scenario in my thesis is the accusations leveled at their 'gay' husbands by my *tongqi* respondents. We can reasonably assume that their anger and bitterness may have become emotional ingredients in their story-telling that lead them to exaggerate, distort or possibly fabricate their 'gay' husbands' apathy or violence.<sup>114</sup> I could not confirm with these men if they really beat or ignored their wives, because it is almost impossible to approach a husband via an (ex)wife who is strongly antagonistic towards him. Hence, I can only remind the readers not to

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112 However, the respondents' right to change their mind and to withdraw the consent should not be infinitely extended after the publication. For a discussion of the time limit on researchers' responsibility and commitment towards research subjects. See Davidson, 'If No Means No' (2008) 61.

113 The ethical dilemmas are shrewdly discussed in David Mosse, 'Anti-Social Anthropology? Objectivity, Objection, and the Ethnography of Public Policy and Professional Communities' (2006) 12 *Journal of the Royal Anthropological Institute (N.S.)* 935-956; Xing Ying, *From 'Asking for Justice' to 'Balancing Relations': A Story of Petitioning in A Hydro-electric Station Area In Southwestern China* (大河移民上访的故事：从“讨个说法”到“摆平理顺”) (Joint Publishing, Beijing, 2001); Yuan-Horng Chu, 'Betrayal: On the Ethnographic Underworld' (背叛/泄密/出卖：论民族志的冥界) (1997) June, *Taiwan: A Radical Quarterly in Social Studies* 26, 29-65.

114 See e.g., the stories in Section 3.4.2.

uncritically take certain one-sided narratives in absence of further evidence, but instead to focus more on the social contexts that produce these words and emotions. Likewise, the single narrative of a 'gay' man about his 'happy' marriage is also likely to be partial if we do not know his wife's views and feelings.<sup>115</sup> However, it would be even more unethical to probe into the 'real' feelings of the unwitting wife of a same-sex-oriented man by first revealing her husband's 'real' sexual orientation. Paradoxically, therefore, a researcher is pressured to be ethical (obtaining informed consent) by being unethical (exposing other's privacy),<sup>116</sup> which is a double-bind closely interwoven with the double-bind of passing and confessing imposed on the same-sex-oriented respondents.<sup>117</sup> The epistemological and methodological implications of these questions will be revisited in the concluding chapter.

Qualitative data is full of clues and scraps of respondents' personal information, so scrutiny and care is required to ensure their anonymity. I use pseudonyms unless a respondent wished otherwise.<sup>118</sup> I also omit certain identifiable traits, shuffle locations and professions, and sometimes give more than one pseudonym to the same person, although such 'manipulation' inevitably compromises the approximation of my accounts to the 'facts' my respondents shared with me. Some of them have also shared their stories and feelings on their own social media accounts (such as blogs or Weibo), and this requires that I take additional care to deal with interview materials in a way that ensures they could not be recognized contrary to their stated preference. In such cases, I further anonymize them by changing their demographic information and withholding references to online resources.

All the links to web pages have been saved to WebCite,<sup>119</sup> an online archiving system for web-references, to ensure that cited web material will remain available to readers in the future, considering that some links may be changed or that some contents may be censored by the authorities. The field notes and transcripts will be stored at the International Information Center and Archives for the Women's Movement in Amsterdam.<sup>120</sup>

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115 See e.g., the story in Section 5.3.2.

116 I encountered such pressure when an anonymous reviewer of one of my journal articles on the same topic required me to present the voice of the wife of a same-sex-oriented man. For more discussion, see Jingshu Zhu, "'Unqueer' Kinship? Critical Reflections on 'Marriage Fraud' in Mainland China' (2017) *Sexualities*, DOI 10.1177/1363460717719240.

117 See above footnotes 46-50 and accompanying text. For my own ethical dilemma in obtaining 'informed consent' in the field, see (forthcoming), Jingshu Zhu, "'We're Not Cheaters': Polyamory, Mixed-Orientation Marriage and the Construction of Radical Honesty' (2018) *Graduate Journal of Social Science*.

118 I will indicate in the footnotes if the names are real ones, or are one's nicknames that are well-known in the local LGBT communities and even in mainstream media. Otherwise, all the names are pseudonyms.

119 [webcitation.org/index](http://webcitation.org/index).

120 [www.webcitation.org/6qkngowja](http://www.webcitation.org/6qkngowja).

## 1.5 THESIS OVERVIEW

Chapter 2 shows the broader legal context in which the familial decisions of same-sex-oriented people are made. It gives a detailed account of the criminality of homosexuality in China. It also analyzes other contemporary Chinese laws that deal with sexual behaviors, organizations, media representation, trademarks and intimate relationships, which are subtly linked to the stigmatization of homosexuals as sexual deviants who are unfit for family life and bad for children, or as ‘family outlaws’. It considers the various forms in which power is used to make homosexuality invisible-and-visible, illegal-and-legal in different circumstances, where the law works as both a juridical and a disciplinary institution to restrain the ‘abnormal’.

Chapter 3 focuses on the imperative applied to most people in China, whether straight or gay, to enter into different-sex marriage. It approaches marital norms from the legal reasoning used in cases of divorce. By studying how Chinese courts construe the provision on ‘complete breakdown of spousal affection’ in divorce cases, we can see how marriage is gendered, and is understood as both utopian and pragmatic in everyday life in contemporary China. This chapter also examines several court cases and life stories to illustrate the marital choices same-sex-oriented people make and their respective socio-legal consequences. The arrangements include staying single, living with one’s same-sex partner, entering into a mixed-orientation marriage,<sup>121</sup> and having a cooperative marriage.<sup>122</sup>

Chapter 4 examines the societal expectation that people have children, and how Family Law in China treats people in different-sex marriages as the most legitimate parents. It also examines how the law disadvantages the unmarried, including same-sex couples. This chapter focuses on the pressure same-sex-oriented people face to have children, and how some of my respondents become parents outside different-sex marriage, in mixed-orientation marriages, or in cooperative marriages. The experiences of using assisted reproductive technology and the legal encounters people have in that context in and outside China are also touched upon.

Chapter 5 discusses the anxiety about getting old common to both younger and older same-sex-oriented people, which is also shared by their parents and, for some, by their straight spouses. It investigates how Family Law grants privileges to people who follow the ‘straight path’ of the heteronormative trajectory of ageing, namely, growing old after taking a spouse and having offspring. In particular, it illustrates how the laws on intestacy, tenancy, social security, tax and medical decision contribute to the creation of a sense of precariousness for the unmarried. It also shows how same-sex-oriented people imagine and actually live their old age, which are constrained by, yet also reconfiguring, the framework of heteronormative family and its laws.

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121 Mixed-orientation marriage is defined in footnote 18.

122 Cooperative marriage is defined in footnote 1.

Chapter 6 has a slightly different focus. While the previous three chapters mainly look at ordinary same-sex-oriented people who do not want to find themselves in close proximity with lawmakers, law enforcers or adjudicators, this chapter looks at the attempts by LGBT NGOs and individual activists to change China's laws on sexual orientation. It documents the major milestones of LGBT legal activism in the 2010s, ranging from strategic litigation, requesting open government information, legislative lobbying, to using international human rights mechanisms. Most issues they have brought up (such as homophobic textbook, conversion therapy, and LGBT-related films) do not strictly belong to Family Law (FL) 1 and 2, but are significant challenges against the FL3 and 4 that produce the deep stigma of family outlaws.

Chapter 7 concludes the thesis by making into a narrative quilt the previous patches of pluralist legalities, marriage, parenthood, eldercare and activism of same-sex-oriented people in China. It further theorizes the epistemology of the straightjacket, the framework of FL1, 2, 3 and 4, and the emotional dimensions of legal consciousness. It also problematizes the mainstream global gay rights politics that is too closely wedded to identity politics, coming out and same-sex marriage. It summarizes the beyond-marriage openings in Chinese law, and discuss the possible routes of activism that values both visibility and ambiguity. In the end, this thesis reflects upon its academic and political contribution, which is not merely to add some 'Chinese cases' to the global gay rights paradigm, but to question its very universality.

Having a 'polyamorous' relationship with law, anthropology, gender/sexuality studies, post-colonial scholarship and activist engagement all at once is challenging but rewarding. I try not to use too many jargons from any of these disciplines. The ethnographic stories in Chapters 3, 4 and 5 come after the black-letter legal analysis, so the readers from a non-lawyer background may skip the first halves of these chapters. The 'Index for Readers of Different Interests' in the end of this thesis can be a helpful navigator. I hope you will be pleased to note, as I do, that the connections between different disciplines, lifestyles and standpoints are as fascinating as their discrepancies.



In November 2013, Changsha *tongzhi* Centre, an LGBT organization, tries to register as a civil organization at the Municipal Civil Affairs Department of Changsha city in Hunan Province.<sup>1</sup> After the application was turned down, the organizer requested the Provincial Civil Affairs Department to explain the reasons. The latter replied in writing:

‘Firstly, according to Article 5 of the Chinese Marriage Law, ‘marriage must be based upon the complete willingness of both man and woman’. That means Marriage Law does not recognize homosexual relationships (*Tongxinglian guanxi*), so the establishment of a homosexual social organization lacks legal basis. Secondly, according to Article 4 of the Regulations for Registration and Management of Social Organizations, ‘social organizations shall observe the constitution, state laws, regulations and state policy, and shall not offend social morality’. Homosexuality is against Chinese traditional culture and socialist spiritual civilization, so the organization in question cannot be allowed to register.’<sup>1</sup>

A lawyer may find the arguments unconvincing and sheer illogical, especially the first one: the right to association and the right to marriage are clearly two distinctive issues, how could the government ignorantly conflate the two? However, as I establish in this chapter, this reply is not simply out of the government’s unprofessional misuse of the two sources of law. Instead, it shows that the moral stigmatization of homosexuality, the denial of their right to association, and the fear for same-sex marriage are deeply interwoven.<sup>2</sup> Together they contribute to and repeatedly reinforce the construction of same-sex-oriented people as what Calhoun calls ‘family outlaws’<sup>3</sup>: they are deemed as sexually deviant and socially untamed, thus unfit for family and bad for children. In light of this concept, I emphasize that same-sex-oriented people’s status in family-law matters (FL1 and 2) cannot be separated from their treatment in other legal fields such as crimi-

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1 Derek Yiu, ‘Chinese Province: Homosexuality “Against Spiritual Civilization”’, 2013 December 8, *Gay Star News*, at [www.webcitation.org/6qVcmGuEQ](http://www.webcitation.org/6qVcmGuEQ).

2 The idea that marriage is a form of intimate association has been elaborated in Kees Waaldijk, ‘The Right to Relate: A Lecture on the Importance of “Orientation” in Comparative Sexual Orientation Law’ (2013) 24 *Duke Journal of Comparative and International Law* 1, 161-199.

3 This concept is elaborated in Cheshire Calhoun, *Feminism, the Family, and the Politics of the Closet: Lesbian and Gay Displacement* (Oxford University Press, New York, 2000) 132-160.

nal law and administrative law (FL3), or in social-cultural domains (FL4),<sup>4</sup> many of which are articulately or implicitly demeaning their subjectivities, behaviors, relationships and communities.

More specifically, this chapter situates the examination of homosexuality and their family life in a broader context, namely, how the past (but lingering) and the existing Chinese FL3 and 4 regulate homosexuality through various power techniques. Section 2.1 describes the laws (de)criminalizing same-sex sexual behaviors, including the repealed crime of hooliganism and the existing laws on other ‘deviant’ homosexual sex. Section 2.2 considers laws that do not directly punish homosexuality but stigmatize it. I cannot provide an exhaustive list of such laws, but will look into a few examples. An important thread that connects the dots and pieces in this chapter is such an observation: Chinese laws often refrain from speaking loudly about homosexuality, but paradoxically have to shout its name out to erase it. In this process, same-sex-oriented people have gained some visibility, yet new problems are also created therefrom.

## 2.1 THE CRIMINALITY OF SAME-SEX SEXUAL BEHAVIORS

The decriminalization of consensual same-sex sexual behaviors between two adults is often seen as one of the first steps towards LGBT liberation, except for countries that have never criminalized homosexuality.<sup>5</sup> Another indicator is the equalization of the age of consent for heterosexual and homosexual sex.<sup>6</sup> Mainland China is often said to have decriminalized homosexuality in 1997, when the amended Criminal Law dropped the umbrella crime of ‘hooliganism’ (*liumang zui*) that covered anal sex, and consequently the age of consent became equalized as well.<sup>7</sup> However, the

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4 The continuum of Family Law (FL1, 2, 3 and 4) has been discussed in Section 1.2. To briefly recap, FL1 refers to the positive laws on narrowly-defined family-law issues such as marriage, parenthood and inheritance; FL2 covers a wider scope of law that contains certain family-law aspects (such as provisions on spousal co-ownership in property law); FL3 include the positive laws that impact indirectly but structurally on family (such as retirement age); and FL4 refers to other informal norms that shape the normative family life.

5 Lucas Paoli Itaborahy and Jingshu Zhu, *State-Sponsored Homophobia: A World Survey of Laws: Criminalization, Protection and Recognition of Same-Sex Love* (International Lesbian Gay Bisexual Trans and Intersex Association, 2014), 15, 20-22.

6 *Ibid.*, 23-24.

7 See e.g., John Balzano, ‘Towards a Gay-Friendly China? Legal Implications of Transition for Gays and Lesbians’ (2007) 16 *Law and Sexuality: A Review of Lesbian, Gay, Bisexual, and Transgender Legal Issues* 1-44, 28-31; Jing Wu Ma, ‘From “Long Yang” and “Dui Shi” to Tongzhi: Homosexuality in China’ (2003) 7 *Journal of Gay and Lesbian Psychotherapy* 1-2, 117-143, 124-127.

trajectory of homocriminality<sup>8</sup> in China is more ambiguous and inconsistent than a linear progression.<sup>9</sup>

Consensual anal sex (*jijian*) was only explicitly criminalized from 1526 to 1911 in the Late Ming and Qing Dynasties.<sup>10</sup> During the Republic China and the early People's Republic of China (1912-1979), there was not any criminal provision on consensual homosexual conducts, although it was extra-legally punished as an administrative offense or as misbehavior against the Party lines in 1950s and 60s.<sup>11</sup> In that period of time, people who have conducted *jijian* were often subject to myriads of non-criminal punishments, including administrative detention, salary cutting, job suspension, labor camp works, naming and shaming, expulsion from the Communist Party, etc.<sup>12</sup>

In 1979, the first Criminal Law of the People's Republic of China started to formally penalize 'the crime of hooliganism'.<sup>13</sup> The judiciary often used it as a catchall crime to cover a wide range of sexual and non-sexual misconducts. According to a nationally binding interpretation made by the Supreme People's Court in 1984, 'hooligan activities' included *jijian* (meaning 'having anal sex') with young boys; *jijian* with male minors by force; repeatedly and severely *jijian* by force or threat'.<sup>14</sup> Although this interpretation did not make it explicit, consensual *jijian* between two adults in private could still be deemed as 'less severe hooligan activities' and thus fall under

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- 8 The term homocriminality conjoins two separate words: 'homo' (the abbreviation of homosexual) and 'criminality' (what relates to crime). This term not only refers to the denouncement of homosexuality in statutory criminal law and in disciplinary settings, but also reminds us to pay attention to the socio-cultural imagination of homosexuality as something inherently attached to criminality, see Derek Dalton, 'Genealogy of the Australian Homocriminal Subject: A Study of Two Explanatory Models of Deviance' (2007) 16 *Griffith Law Review* 83-106.
- 9 For a more thorough analysis, see Xiaofei Guo, 'Did China Ever Decriminalize Homosexuality? (中国有过同性恋的非罪化吗?)' (2007) 4 *Rule of Law and Social Development* 51-65.
- 10 Mathew Harvey Sommer, 'The Penetrated Male in Late Imperial China: Judicial Constructions and Social Stigma' (1997) 23 *Modern China* 140-180.
- 11 See Philip C Huang, *Code, Custom and Legal Practice in China: The Qing and the Republic Compared* (Stanford University Press, Stanford, 2001) 18, 21; Wenqing Kang, 'Male Same-Sex Relations in Modern China: Language, Media Representation, and Law, 1900-1949' (2010) 18 *Positions: East Asia Cultures Critique* 2, 489-510, 500-506.
- 12 Guo, 'Did China Ever Decriminalize Homosexuality?' (2007) 61.
- 13 Criminal Law of the People's Republic of China, adopted 1 July 1979, effective 1 January 1980, revised 14 March 1979, effective 1 October 1997, (hereinafter '1997 Criminal Law'). In the 1979 version, Article 160 para 1 stipulated: 'Where one engages in affrays in an assembled crowd, creates disturbances, humiliates women or engages in other hooligan activities that undermine public order, if the circumstances are flagrant, the offender shall be sentenced to fixed-term imprisonment of not more than seven years, criminal detention or public surveillance.'
- 14 Explanation Regarding Several Questions on the Use of Law in Managing Hooligan Cases (最高人民法院、最高人民检察院关于当前办理流氓案件中具体应用法律的若干问题的解答), issued by Supreme People's Court and Supreme People's Procuratorate on 2 November 1984, effective 2 November 1984.

administrative surveillance, control and even arbitrary punishment in lack of due process.<sup>15</sup>

From 1983 to 1986, despite the principle of legality enshrined in the 1979 Criminal Law, the Communist Party initiated an extra-legal 'strike-hard campaign', sponsored by an *ad hoc* decision of the national legislature, arbitrarily aggravating the sentencing of several crimes without going through the legislative procedures.<sup>16</sup> The punishment for serious hooliganism, among some other crimes, was raised up to death penalty. It is unclear whether consensual *jijian* was deemed as criminal hooligan activities with 'especially serious consequences', so we can hardly say it was formally re-criminalized in that period.<sup>17</sup> Soon after its commencement, however, the strike-hard campaign was expanded towards harshly and swiftly punishing numerous slight misconducts, and it was reported that a prisoner engaging in consensual same-sex acts was sentenced to death.<sup>18</sup> Many other people engaging in same-sex activities were prosecuted or harassed during the campaign.<sup>19</sup>

The alleged official decriminalization happened in 1997, when the revised Criminal Law highlights the principle of legality, which makes it unlawful to make analogies to the disadvantage of the defendant.<sup>20</sup> Under this principle, the crime of hooliganism was considered overly broad. The crime was then broken down into four more specific crimes, and consequently the clause on 'less severe hooligan activities' disappeared, too.<sup>21</sup> As a corollary, the provision in the 1984 judicial interpretation on the crime of hooliganism, including its paragraph about *jijian*, also became invalidated,

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15 Ibid, 'those who committed less severe hooligan activities (*qingjie qingwei*) that did not amount to crime should be given administrative punishments, rehabilitation through labor or other sanctions.' See also, Yinhe Li, *Subculture of Homosexuality* (同性恋亚文化) (China Today Press, Beijing, 1998).

16 See Decision of the Standing Committee of the National People's Congress Regarding the Severe Punishment of Criminals Who Seriously Endanger Public Security (全国人民代表大会常务委员会关于严惩严重危害社会治安的犯罪分子的决定[失效]), adopted by Standing Committee of the National People's Congress on 2 September 1983, effective 2 September 1983, invalid 1 October 1997.

17 Ibid, Article 1, 'Punishment above the maximum punishment stipulated in the Criminal Law, up to and including death sentences, may be inflicted on the following criminals who seriously endanger public security: (1) ringleaders of criminal hooligan groups or those who carry lethal weapons to engage in criminal hooligan activities, if the circumstances are serious, or those who engage in criminal hooligan activities leading to especially serious consequences ...'.

18 The anecdote was found online, the credibility of which might be questioned. See Jiawei Yan, *A Homosexual Executed During Strike-Hard Campaign* ("严打"中被处死的同性恋者), 20 August 2007, *Tianya BBS*, at [www.webcitation.org/6qVdxu2Bl](http://www.webcitation.org/6qVdxu2Bl).

19 Tze-Lan D Sang, *The Emerging Lesbian: Female Same-Sex Desire in Modern China* (University of Chicago Press, Chicago and London, 2003) 167.

20 See 1997 Criminal Law, Article 3.

21 See 1997 Criminal Law, Articles 237, 292, 293 and 301.

although the document was officially abolished only in 2010.<sup>22</sup> No further legislation or adjudication has made consensual sexual behaviors between two same-sex adults in private a crime. Therefore, it is commonly held that 1997 marks the year of China's official decriminalization of homosexuality.

However, the so-called decriminalization was arguably unintended and incomplete. It is incomplete because although hooliganism as a crime was abolished, the administrative power remained. Note that in China crimes and less serious administrative offenses are regulated in two separate systems. That means that the police was still entitled to intervene in 'other hooligan activities' until 2006 according to the (now abolished) Regulation on Administrative Penalties for Public Security.<sup>23</sup> Nor did the stigmatic word '*jijian*' completely disappear in law after the repeal of hooliganism. In 2001, the Ministry of Public Security issued a document defining commercial sexual behaviors as 'sexual misconducts on condition of money or property, between people of different sexes or of the same sex, including oral sex, masturbation and *jijian*'.<sup>24</sup> Although this is not binding criminal legislation, a few court cases have found commercial same-sex activities guilty,<sup>25</sup> which acquiesces with this definition.

The decriminalization was also unintended, because there was no expressed legislative intent in the 1997 law to decriminalize homosexuality; there was not even a single debate, in legislature or in public, on the legality or morality of consensual homosexual acts between two adults in private; nor were there any LGBT rights activists or organizations participating in

22 The 1984 Explanation regarding hooligan cases as indicated in footnote 14 was invalidated by the Decision of the Supreme People's Court and the Supreme People's Procuratorate on Abolishing Some Judicial Interpretations and Regulatory Documents, issued 13 December 2010, effective 22 December 2010.

23 'Hooligan activities' remained in Article 19 (4) of the Regulations on the People's Republic of China on Administrative Penalties for Public Security, adopted 9 May 1986, effective 1 January 1987, invalidated by Public Security Administration Punishments Law of the People's Republic of China, promulgated 28 August 2005, effective 1 March 2006. In the latter law, the umbrella term 'hooligan' disappeared. See also, Jia Ping, 'Existence and Dignity: The Change of Chinese Law on Homosexuality from the Case Concerning Xue (存在与尊严: 从薛某案看当代中国同性恋相关法律的变迁)' (2008) *Friends Communication* (朋友通信).

24 Reply of Ministry of Public Security on Defining Commercial Same-Sex Sexual Behaviors (公安部对同性之间以钱财为媒介的性行为定性处理问题的批复), issued 18 February 2001, effective 18 February 2001.

25 See e.g. *Case concerning Wang Zhiming Organizing Male Prostitution*, Shanghai Changning District People's Court, 7 July 2003, no. 264 (王志明组织卖淫案刑事判决书, 上海市长宁区人民法院(2003)长刑初字第264号); *Case concerning Li Ning Organizing Prostitution*, Jiangsu Nanjing Intermediate People's Court, 30 April 2004, no. 122 (李宁组织卖淫案刑事裁定书, 江苏省南京市中级人民法院(2004)宁刑终字第122号); *Case concerning Wang Chunmeng Introducing Prostitution*, Zhejiang Ningbo Intermediate People's Court, 6 February 2012, no.66 (王春猛介绍卖淫案刑事裁定书, 浙江省宁波市中级人民法院(2012)浙甬刑二终字第66号). For a criticism of the taken-for-granted application of the law on different-sex prostitution to same-sex commercial sex, see Xiaofei Guo, 'Jurisprudential Analysis of a Same-Sex Prostitution Case (对一起同性卖淫案的法理学解读)' (2004) 5 *Open Times* 132-145.

the law-revising process. Rather, the abolition of hooliganism was mainly resulted from other concerns: the umbrella term of ‘other hooligan activities’ goes against the principle of legality,<sup>26</sup> and minor offences should be removed from criminal law.<sup>27</sup> Therefore, unlike the Stonewall mobilization<sup>28</sup> or the Wolfenden Report<sup>29</sup>, the decriminalization in China cannot count as a purposeful effort of either the state or the gay communities towards the repeal of anal sex as a victimless crime, or towards respect for privacy.<sup>30</sup>

Moreover, the disappearance of ‘hooliganism’ in Criminal Law is not necessarily a positive move towards protecting men against bodily harm and intrusion: the new law ignores coercive anal sex between adult men, which was actually included in the previous crime of hooliganism. Until the Ninth Amendment of Criminal Law in 2015, only women and children can be the victims of sexual assault;<sup>31</sup> and to date men still cannot be victims of rape.<sup>32</sup> The first court case in China concerning the ‘rape’ of a male by a male reportedly happened in 2011, where the perpetrator was only convicted of intentional injury, and was sentenced for one-year imprisonment.<sup>33</sup>

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26 See above, footnote 20.

27 Guo, ‘Did China Ever Decriminalize Homosexuality?’ (2007) 54.

28 The birth of the modern highly visible gay rights movement is usually associated with the 1969 ‘Stonewall Riot’, a spontaneous protest that arose following a police raid at a gay bar in New York City, see D’Emilio John, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1980* (University of Chicago Press, Chicago, 1983).

29 The report mainly discusses ‘victimless crime’, which is one of the major reasons why homosexuality was decriminalized in some western countries. Committee on Homosexual Offences and Prostitution in Great Britain, *The Wolfenden Report: Report of the Committee on Homosexual Offences and Prostitution* (1957) 205.

30 The privacy argument can be found in, e.g., *Lawrence v. Texas*, 539 United States Supreme Court 558 (2003)

31 1997 Criminal Law, Article 237 (1): ‘Whoever acts indecently towards or insults a woman by force, threat or other means shall be sentenced to fixed-term imprisonment of not more than five years or criminal detention.’ In Amendment (IX) to the Criminal Law of the People’s Republic of China, adopted 29 August 2015, effective 1 November 2015, Article 237 of the Criminal Law is amended to read: ‘Whoever, by violence, coercion or other means, forces or molests any other person or humiliates a woman shall be sentenced to imprisonment of not more than five years or criminal detention’ (emphasis added).

32 1997 Criminal Law, Articles 236 (1): ‘Whoever rapes a woman by force, threat or other means shall be sentenced to fixed-term imprisonment of not less than three years and not more than ten years’.

33 See Decaan Herald, ‘First Case of Man Raping Man in China Leads to Legal Dilemma’, *Deccan Herald*, 5 January 2011, at [www.webcitation.org/6qVeHeH35](http://www.webcitation.org/6qVeHeH35). On a side note, the crime of acting indecently against or insulting a woman by force can be perpetrated by both men and women, and a woman can be an accomplice in committing rape. Therefore, women who suffered same-sex sexual harassment are better protected in Criminal Law than men are. In 2012, the first case concerning a woman insulting another was heard in Beijing Chaoyang Trial Court, where the perpetrator was charged under the crime of insulting a woman by force. The decision cannot be found online. See Lei Zhang, ‘A Lesbian Charged of Insulting a Woman May Endure up to Five Years’ Imprisonment’ (女同性恋强制猥亵妇女被诉 最高可能被判5年刑), *Beijing Evening Paper*, 20 April 2012, at [www.webcitation.org/6qVelpi3f](http://www.webcitation.org/6qVelpi3f).

Compared to the sentencing of rape, which is at least three years imprisonment (and up to capital punishment), the crime of intentional injury falls short of equally protecting men and proportionally punishing criminal behaviors. Were there no minor injury, the perpetrator would not, until the 2015 revision, have had any criminal responsibility. Between 1997 and 2015, sexually molesting a male person without inflicting any physical injury could only lead to administrative punishment, the maximum penalty is 10 days of detention.<sup>34</sup>

Moreover, despite the formal 'progress', the change in Criminal Law on sexual molestation has limited effect in de-stigmatizing homosexuality. The titles or subtitles of most media coverage about this amendment often used statements like 'same-sex molestation no longer unpunished', exemplifying with stories of how a homosexual man heartlessly insulted a teenager or an elder,<sup>35</sup> which reinforces the stereotype that homosexuals are sexual perverts who try to 'recruit' or 'harass' heterosexuals. Especially, when the victims are the stereotypically born-straight children or asexual old men who were also straight, the same-sex-oriented perpetrators are depicted even more evil.<sup>36</sup>

In reality, moreover, the end of policing and prosecuting *jijian* does not mean that the embodied history of homocriminality can be wiped off. Those who had been convicted of hooliganism cannot have their criminal record removed or changed even after 1997.<sup>37</sup> Such a permanent stigma can incur

34 Public Security Administration Punishments Law, see above, footnote 23, Article 44.

35 See e.g., 'Forced Sexual Molestation of Male Is Criminalized, Filling the Vacuum of Same-Sex Sexual Assault (强制猥亵男性入罪 填补同性性侵法律空白)' 28 October 2104, *Guangming Daily*, at [www.webcitation.org/6qVeuD8GC](http://www.webcitation.org/6qVeuD8GC); see also, 'Young Man Sexually Molested An Elderly Male Gatekeeper of An Orchard, Sentenced Two Years and Eight Month' (90后男子性侵果园大爷 获刑二年八个月), 15 January 2016, *East Day*, at [www.webcitation.org/6qVevvZOj](http://www.webcitation.org/6qVevvZOj). Most media reported this case in an eye-catching but misleading way. Since the assaulting behaviors happened before the amendment of the Criminal Law, the sentencing of the young man was not pursuant to the crime of sexual molestation, but other criminal behaviors, i.e., robbery and sheltering others to take narcotic drugs. However, most media focused on the false link between his homosexuality, the molestation behaviors, and his imprisonment. The 'deviant' sexual elements indeed attracted much more attention from the public.

36 For a critical analysis of the age politics in connection with homophobia, see Eve Kosofsky Sedgwick, 'How to Bring Your Kids Up Gay' (1991) 29 *Social Text* 18-27.

37 For example, in 1984, a male-attracted man, Xue, was sentenced retroactively to three years imprisonment for having committed hooliganism. In 2005, he applied for review for twice, requesting the superior courts to overturn his case, but both courts dismissed his application. He could have complained further, but he was afraid that if his complaint were rejected by higher courts, it would be an adverse precedent for other people, Zhang Beichuan, 'Getting to Know Same-Sex Love: Seminar on Sexual Orientation Discrimination and Human Rights Law (认识同性爱取向歧视与人权法治建设研讨会)' (2008) 61 *Friends Correspondence (朋友通信)* 10-28, 15; Jia, 'Existence and Dignity' (2008).

many disadvantages:<sup>38</sup> the pension given to these released prisoners are much lower than other citizens; they suffer discrimination and ridicule in workplace and neighborhood; even their next generations might be influenced – it has been reported that the son of a previous ‘hooligan criminal’ was rejected by the army because of the father’s tainted past.<sup>39</sup> In addition, both before and after 1997, governmental officials and the police have aperiodically harassed gay bars and arrested same-sex-oriented people in name of ‘public morality’ or other ambiguous terms.<sup>40</sup>

No wonder Guo raised the thought-provoking question as the title of his essay, ‘Did China ever decriminalize homosexuality?’<sup>41</sup> The answer should be a ‘yes, but...’. Although one cannot deny the positive aspects of the repealing of the crime of hooliganism, we should also be more attentive to its specific legal-political contexts and consequences. The ‘decriminalization’ of homosexuality in mainland China is not a linear story of progress because, to sum up the above analysis, in the 1979 Criminal Law (and in a long period of time before that), consensual anal sex was not a crime in the first place; the abolition of hooliganism was not pushed by a mobilizing gay community who successfully lobbied some legislators; and it was a silent change that had limited educatory effects on the public about the legality and morality of homosexuality.

## 2.2 MULTIPLE POWER TACTICS IN CONTEMPORARY CHINESE LAW ON HOMOSEXUALITY

After the incidental ‘decriminalization’ of hooliganism, the imagery that same-sex-oriented people are immoral, deviant ‘hooligans’ is still haunting many areas of law. In contemporary Chinese law, the regulation and control over homosexuality has become more meticulous and versatile, and the effects of these power tactics are multifold, too. This section examines how the Foucauldian juridical power and disciplinary power<sup>42</sup> coexist in Chinese laws on homosexuality; how prohibition, tolerance, utilization, encourage-

38 The continual keeping of the criminal records of convictions for ‘sodomy’ has been found discriminatory and an infringement of the right to privacy by the European Court of Human Rights, see *E.B. and Others v. Austria* (Applications nos. 31913/07, 38357/07, 48098/07, 48777/07 and 48779/07) Judgment, Strasbourg 7 November 2013.

39 See above, footnote 37.

40 Lisa Rofel, *Desiring China: Experiments in Neoliberalism, Sexuality, and Public Culture* (Duke University Press, Durham, 2007) 96.

41 Guo, ‘Did China Ever Decriminalize Homosexuality?’ (2007) 61.

42 Juridical power centers around the statements of orders and prohibition, whereas disciplinary power works to ‘train’ people to become tame and useful. The co-existence different types of power in both legal and non-legal fields is discussed in Michel Foucault, *The History of Sexuality (Volume 1: An Introduction)* (Pantheon Books, New York, 1978) 87-89; *Discipline and Punish* (Vintage, New York, 1979) 170; *Power/knowledge: Selected Interviews and Other Writings, 1972-1977* (Pantheon Books, New York 1980). See also, Dean Spade, ‘Laws as Tactics’ (2011) 21 *Columbia Journal of Gender and Law* 442-473.

ment and neglect are simultaneously deployed in laws and the application thereof; and how non-legal discourses are appropriated and incorporated into legal arguments. As shown below, these tactics are exercised in various aspects of homosexuality: sexual behavior, organization, media representation, symbol and relationship. While these laws can have powerful effects in regulating homosexuality, they also have unintended consequences, which is particularly evident in the space of resistance they open up through the very regulation.

### 2.2.1 Forbidding and Taming Same-Sex Sexual Behaviors

As discussed above, consensual same-sex sexual behaviors are not completely lawful after the abolition of the hooliganism provisions in 1997. Oral sex, masturbation and *jijian* for a fee, like commercial penal-vaginal sex, both between people of different sexes or of the same sex, all count as prostitution, and are liable for administrative punishments.<sup>43</sup> Group sex, which necessarily involves at least two people of the same sex, is also prohibited.<sup>44</sup> Commercial sex and group sex, according to Rubin's theorization of the sexual hierarchy, situate in the outer limits of the charmed circle that legitimizes and blesses heterosexual, married, monogamous, procreative, non-commercial, non-pornographic sex.<sup>45</sup> The stigmas on these 'indecent' behaviors are amplified when homosexuals are doing them, as illustrated by the degrading words in some media coverage.<sup>46</sup> While monogamous homosexual sex in private is moving upwards the sexual hierarchy due to its assimilative strategies, these behaviors often have a more difficult time struggling on the legal and moral low ground.<sup>47</sup>

Male homosexual behaviors are also regulated in a cluster of administrative regulations concerning the prevention and treatment of HIV/AIDS issued by the Ministry of Health and local bureaus. Here power works in a softer way than prohibiting and punishing. In these regulations, the term

43 See above, footnote 24 and accompanying text.

44 Article 301 of the 1997 Criminal Law punishes those who 'takes a lead in assembling a crowd to engage in promiscuous activities or repeatedly participates in such activities', and Article 69 of the Public Security Administration Punishments Law would hold 'anyone who joins in licentious activities or knowingly facilitates any other person to engage in such activities liable for detention and possibly a fine'. For more discussion on the crime of group licentiousness, see Xiaofei Guo, 'Jurisprudence and Public Opinions in the Ma Yaohai Group Licentiousness Case (马尧海聚众淫乱案件中的法理与民意)' in Yin-Bin Ning (ed) *New Moralism* (Center For the Study of Sexualities, Dept. of English, National Central University of Taiwan, 2013).

45 Gayle S Rubin, 'Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality' in Carole S Vance (ed) *Pleasure and Danger: Exploring Female Sexuality* 267-319 (Routledge and Kegan Paul, Boston, London, Melbourne and Henley, 1984).

46 See e.g., Zhejiang Online, '40 Men Conducting Group Licentiousness; the First Same-Sex Prostitution Venue Stricken Down in Hangzhou (40名男子淫乱 杭州端掉首个同性卖淫点)', *Tencent News*, 3 August 2008, at [www.webcitation.org/6dH4B9TXH](http://www.webcitation.org/6dH4B9TXH).

47 Rubin, 'Thinking Sex' (1984) 282.

'homosexuality' (*tongxinglian*), notwithstanding the word *lian* (love), refers almost only to male-to-male anal intercourse, and 'homosexuals' (*tongxinglian zhe*) only to men who have sex with men (MSM). These men are defined and controlled as one of the 'high-risk groups'.<sup>48</sup> These regulations do not denounce male-to-male sexual behaviors as criminal or immoral, but oblige the local governments to encourage MSM to carry out peer education.<sup>49</sup> Therefore, when MSM can be tamed and utilized to prevent the spreading of HIV/AIDS, the law is not always hostile to them. While the high visibility of male homosexuals in the regulations on HIV/AIDS allows gay groups to get more funding on HIV/AIDS related causes, the expectations of the funders nevertheless constrain them from working on larger portfolio of political issues.<sup>50</sup>

The duality of stigmatizing and utilizing homosexuality is also shown in the law on blood donation.<sup>51</sup> Before 2012, all 'homosexuals' were prohibited from blood donation, whereas now the ban is imposed on MSM only.<sup>52</sup> The new regulation sustains the stereotypical link between MSM and sexually transmitted diseases, and does not differentiate unprotected penetrative sex from other male-to-male sexual behaviors. The change from homosexual to MSM releases women who have sex with women (WSW) and those homosexual-identified men who do not have sex with men from the blood donation ban, due to their perceived smaller chances of having HIV/AIDS. Lesbian groups have taken this opportunity to celebrate the 'liberation' of WSW, and accordingly to advocate the legitimacy of lesbian relationships.<sup>53</sup> However, in the official explanation of the new rules, there is no intention of de-stigmatizing or recognizing WSW or celibate same-sex-oriented men.<sup>54</sup>

48 See e.g., Provisional Measures for Intervening High-Risk Behaviors (高危行为干预工作指导方案(试行)), promulgated by the Ministry of Health on 20 May 2005, effective 20 May 2005; see also, Measures of Hubei Province on Prevention and Treatment of HIV/AIDS (湖北省艾滋病防治办法), promulgated by the Hubei Provincial Government on 31 May 2007, effective 1 July 2007, Article 70 (4).

49 Ibid.

50 See Timothy Hildebrandt, 'Same-Sex Marriage in China? The Strategic Promulgation of A Progressive Policy and Its Impact on LGBT Activism' (2011) 37 *Review of International Studies* 1313-1333, 1330.

51 Blood donation ban on MSM is a long disputed issue in many other countries. For a discussion of its legitimacy, see e.g., Kylie Valentine, 'Citizenship, Identity, Blood Donation' (2005) 11 *Body and Society* 2, 113-128.

52 See the Whole Blood and Component Donor Selection Requirements GB18467-2011 (献血者健康检查要求) jointly promulgated by the Standard Administration and Ministry of Health on 30 December 2011, effective 1 July 2012.

53 See Queer Comrades, "'Proud to Give Lesbian Blood" Campaign in China', *Youtube*, 2 August 2013, at [www.webcitation.org/6qVffvV3a](http://www.webcitation.org/6qVffvV3a).

54 See Q and A about the Whole Blood and component Donor Selection Requirements (关于《献血者健康检查要求》(GB 18467-2011)的答问), Ministry of Health, 9 July 2012, at [www.webcitation.org/6ssPYJbHD](http://www.webcitation.org/6ssPYJbHD).

Although such advocacy has made the oft-neglected lesbians more visible in Chinese media, it is questionable whether such lesbian separatist strategy is challenging or reinforcing the gay stigma that made MSM an arbitrary criterion for the blood donation ban in the first place.

## 2.2.2 Prohibiting Homosexual Gatherings and Organizations

It is claimed that the history of homosexual emancipation is very much that of lesbian and gay organizations,<sup>55</sup> and that a prerequisite of such emancipation has to be that there are minimum conditions for like-minded people to come together.<sup>56</sup> Official recognition of and support for lesbian and gay organizations would not only confirm their legitimacy symbolically, but also provide them many practical conveniences: the ability to enter into contract as a legal person, tax exemption, access to governmental hearings, etc.

Chinese same-sex-oriented people have many difficulties in coming together. The authorities have frequently raided before or during their gatherings.<sup>57</sup> Queer film festivals were often forced to cancel, and some events have to turn underground.<sup>58</sup> In May 2013, the organizer of a gay pride parade in Changsha, Hunan Province was arrested, because he did not report to the authorities beforehand.<sup>59</sup>

The administrative reply cited in the beginning of this chapter also shows that homosexual groups are not allowed to be formally registered as civil organizations with a 'gay' name.<sup>60</sup> In that reply, in addition to 'traditional culture', 'socialist spiritual civilization' is also used as reasons for the prohibition. In China, it is not a novelty to antagonize homosexuality with socialism.<sup>61</sup> Socialist spiritual civilization is an umbrella term that covers a

55 Kees Waaldijk, 'Standard Sequences in the Legal Recognition of Homosexuality: Europe's Past, Present and Future' (1994) 4 *Australasian Gay & Lesbian Law Journal* 50-72, 55.

56 Jeffrey Weeks, *Coming Out: Homosexual Politics in Britain from the Nineteenth Century to the Present* (Quartet Books, London, 1977) 6; Waaldijk, 'The Right to Relate' (2013) 29.

57 Sexuality-related salons and workshops are often interrupted or cancelled by the authorities. For more details, see Ma, 'From "Long Yang" and "Dui Shi" to Tongzhi' (2008) 137.

58 See Rachel Leng, 'Chinese Comrade Literature, Queer Political Reality, and the Tongzhi Movement in Mainland China' (Undergraduate Honors Thesis, Sanford School of Public Policy, Duke University, 2012), 98.

59 Jefferson Mendoza, 'A 19-year Old is Detained by Police for Organizing a Gay Pride Parade in Changsha', *the Nanfang*, 5 June 2013, at [www.webcitation.org/6qVfjHpen](http://www.webcitation.org/6qVfjHpen).

60 See above, footnote 1 and accompanying text. In fact, some LGBT organizations did succeed in formal registration, either in name of a commercial organization (thus unable to enjoy NGO's tax advantages), or as civil organization yet erasing the LGBT-related words in their names or description. Interviews with coordinators of PFLAG China and Zhitong Guangzhou LGBT center, November 2014.

61 For instance, a textbook, *The Science of Sex*, published in 1983, emphasized 'to avoid the popularization of *tongxinglian*, it is necessary to criticize capitalism and to insist on the Four Basic Principles of Socialism', quoted from Wah-Shan Chou, *Tongzhi: Politics of Same-Sex Eroticism in Chinese Societies* (Haworth Press, New York, 2000), 112.

wide range of ideas, from the socialist belief, ethics, discipline, camaraderie among people, to civilized, healthy lifestyles.<sup>62</sup> Without explaining why homosexuality is against this ethos, the authorities simply appropriated this term to exclude non-normative subjects and their grassroots organizations.

Notwithstanding the obstacles for homosexual organization and group activities to be formally recognized, the prohibition can also create some chances of education and advocacy. For instance, during the twelve days in the detention house, the organizer of the Changsha 2013 gay pride parade, Xiao Han,<sup>63</sup> took the opportunity and kept educating the police officers and wardens about sexual orientation. Many of them expressed respect and understanding towards same-sex-oriented people. Moreover, he acknowledged, the interference of the police had made this event a hotspot on domestic and international media, and stirred up more discussion regarding gay rights and the more general right to assembly in China.<sup>64</sup>

### 2.2.3 Censoring Homosexual Media Representation

Texts or scenes about homosexuality are often put in parallel with all sorts of 'sexually perverted acts' in the regulations concerning obscene and pornographic information or publications in China.<sup>65</sup> This is also the case in film censorship. In 2004, the State Administration of Radio, Film and Television (SARFT)<sup>66</sup> promulgated an official regulation that concerns the moral wellbeing of the adolescents, which stipulates,

'Broadcasts, television programs and films should fully consider the habits, level of acceptance and development of the adolescents ... Unhealthy content related to sex, such as lines, scenes and plots that promotes sexual freedom, casual sex, sexual pleasure and *homosexuality* should be cut out'.<sup>67</sup>

62 'Decision of Chinese Communist Party on the Guidelines of Developing Socialist Spiritual Civilization (中共中央关于社会主义精神文明建设指导方针的决议)', 28 September 1986, CPC, [www.webcitation.org/6qWQxeI7F](http://www.webcitation.org/6qWQxeI7F).

63 I use his real name and relevant information online.

64 Ah-Qiang, 'Xiao Han: Dissimilating Knowledge about *Tongxinglian* in the Detention House' (小寒:我在拘留所里普及同性恋知识), *Fenghuang Blog*, 30 May 2013, [www.webcitation.org/6qWOfgTor](http://www.webcitation.org/6qWOfgTor).

65 See e.g., Provisional Regulations on the Identification of Obscene and Pornographic Publications (关于认定淫秽及色情出版物的暂行规定), issued by General Administration of Press and Publication on 27 December 1988, effective 27 December 1988, Article 2 (6); see also, Self-Regulation of the Internet Sites on Prohibiting the Dissemination of Obscenity, Pornography and Other Harmful Information (互联网站禁止传播淫秽、色情等不良信息自律规范), issued by Internet Society of China on 10 June 2004, effective 10 June 2004, Article 3 (6).

66 The name of this administration has been changed into State Administration of Press, Publication, Radio, Film and Television of the People's Republic of China. For the expediency of this thesis, it is still referred to as SARFT.

67 See Measures Ensuring that Broadcasts, Television Programs and Films Strengthen and Correct the Moral Character of Adolescents (广播影视加强和改进未成年人思想道德建设的实施方案), SARFT, issued and effective on 30 April 2004, para. 15, emphasis added.

In 2008, SARFT again clearly forbade ‘intermittent salaciousness, sex and vulgar content, depicting details such as promiscuity, rape, prostitution, sexual behavior, *homosexuality*, masturbation, male and female genitalia and other intimate parts; intermittent filthy lines, songs, background music and sound effects, etc.’.<sup>68</sup> A SARFT Decision in 2010 has abolished the 2008 Notice,<sup>69</sup> but there are no new rules replacing the censorship criteria. Now it seems that the only effective two legal documents on censorship would be a 2006 regulation, which says nothing about homosexual scenes,<sup>70</sup> and the 2004 regulation that does forbid homosexual representation. Although the latter aims to protect adolescent audiences, its regulative sleeves reach further than children’s shows. As China does not have a rating system, all broadcast, TV programs and films are available for both children and adults. Therefore, according to this regulation, all homosexuality-related content should be cut off in a one-size-fits-all fashion. And discrimination is obvious here: same-sex love stories or intimate scenes, regardless of being sexual or not, are in and of themselves debauchery, while different-sex couples can legitimately hug, kiss, flirt, make out and marry on screen. Such differentiation again reduces the rich subjectivities of same-sex-oriented people into sexual beings only.

In recent years, however, a few films with one or more homosexual supporting roles have been screened publicly in Chinese cinemas, such as *If You Are the One* in 2008.<sup>71</sup> There are also a few LGBT-friendly Internet entertainment shows, such as *Weirdos’ Talk* (*Qipa Shuo*, a debate show that seriously discussed coming-out issues in 2015), and *Coming or Not* (*Ai Lai Bu Lai*, an LGBT friend-making entertainment show in 2016). This could be seen as an informal loosening of the regulation on LGBT representation. Yet still, for the directors of the films containing LGBT roles or same-sex love and/or sex scenes, the unpredictable censorship would amply restrict and discourage their creativity. The efforts of the authorities to negate and hide homosexuality in media, which is theorized as ‘semiotic erasure’<sup>72</sup> or ‘symbolic

68 Notice of SARFT Reiterating the Standards of Movie Censorship (广电总局关于重申电影审查标准的通知), issued and effective 7 March 2008, invalid 11 November 2010, para 3 (3), emphasis added.

69 Decision on Abolishing Certain Regulations and Regulatory Documents Concerning Broadcasting and Film (关于废止部分广播影视部门规章和规范性文件的决定), SARFT, issued and effective on 11 November 2010.

70 Provisions on the Archival Filing of Film Scripts (Abstracts) and the Administration of Films (电影剧本(梗概)备案、电影片管理规定), issued by SARFT on 22 May 2006, effective 22 June 2006, article 14 (3). The only difference of this article from the one in the 2008 Notice is the absence of “homosexuality”.

71 Wei Wei, ‘From Symbolic Annihilation to Censored Publicity: The Representation of Homosexuality in the Film *If You Are the One* (从符号性灭绝到审查性公开:《非诚勿扰》对于同性恋的再现)’ (2010) 2 *Open Times* 84-99.

72 Ibid.

annihilation<sup>73</sup>, reinforce the imagination of same-sex-oriented people and their lives as underground, shameful and having no other significant aspects than sex. Chapter 6 will come back to this issue, where a queer filmmaker challenged the SARFT's arbitrary ban on his documentary about lesbian and gay people coming out to parents.

#### 2.2.4 Erasing Homosexual Trademarks

Not only homosexual behaviors, organizational activities and media representation are under the surveillance of Chinese law, trademarks hinting homosexuality also catch the law's attention. A court case on a lesbian-related trademark deserves close examination here.<sup>74</sup> In this administrative proceeding in Beijing's First Intermediate Court, the plaintiff Wang Fang had applied to register a trademark named 'Von Butch' for the daily commodities her company produced. The Trademark Review and Adjudication Board of the State Administration for Industry and Commerce (hereinafter 'the Review Board') dismissed the application, because:

'Butch, according to the English-Chinese dictionary, means a lesbian who plays the masculine role or a manlike woman<sup>75</sup>... which contains an implication of homosexuality (*tongxinglian*) and can have negative influences on society... Hence, in light of Article 10.1.8. of the Trademark Law of People's Republic of China, which reads "The following signs shall not be used as trademarks: ... those detrimental to socialist morals or customs, or having other unhealthy influences", the application shall not be accepted.'

In her submission, Wang argued as follows:

'To consider "Butch" as detrimental to socialist morals or customs is without doubt discriminatory against homosexuals (*tongxinglian zhe*). Homosexuality in China has been officially announced as not a mental disease. It is said that there are above 30 million homosexuals in China... Homosexuality is neither pathologic, nor perverse; it is not a crime or corruption, nor is it immoral or unethical. The defendant's discrimination against homosexuality would hurt people's sentiments (*guomin ganqing*), which is running against the governmental policies and legal principles.'

The Court did not support her argument. It maintained:

'Whether a sign counts as "having other unhealthy influences" should be judged from its original meaning, with reference to the public perception of it. The Review Board should consider whether the sign or its components might have some negative impacts on the

73 Becker Ron, *Gay TV and Straight America* (Rutgers University Press, New Brunswick, New Jersey and London, 2006) 6.

74 *Wang Fang v. The Trademark Review and Adjudication Board of the State Administration for Industry and Commerce* (王芳诉国家工商行政管理总局商标评审委员会商标行政纠纷案行政判决书, 北京市第一中级人民法院(2012)一中知行初字第1116号), Beijing Intermediate People's Court, Judgment, No. 1116 (2012).

75 The original text is '充当男人的女同性恋者或男人似的女人'.

public interest and public order in politics, economy, culture, religions, ethnicity and etcetera of our country. The determination of whether the sign in question has an unhealthy element is irrelevant to the discrimination against homosexuals. Just like in Chinese characters, words with radicals or affixes like “female” or “corpse” cannot be registered as trademarks because of their unhealthy influences. To consider these words “unhealthy” is not to denigrate females or corpses. The same reasoning applies to the instant case.’

The Court concluded,

‘Butch means mannish lesbian, and “Von Butch” as a whole does not have a new meaning. Therefore, this sign has an unhealthy element, which will be detrimental to the society if used as a trademark.’

The Court therefore upheld the decision of the Review Board, and Wang did not file an appeal. This is the first published judgment in China on a trademark registration dispute involving a ‘gay word’. The case in question is neither about scandalous or immoral products, nor is the mark associated with any same-sex activity or political initiative.<sup>76</sup> It is rather about the ‘magic’ word per se, and perhaps more profoundly, about the authorities’ fear for the uncontrollable consequences such a ‘Pandora’s box’ might trigger – once the (presumably straight and innocent) consumers get to know the ‘abnormal’ and ‘immoral’ lesbian world attached to this sign, are they likely to be ‘corrupted’?

The original text in Trademark Law does not directly exclude signs involving homosexuality. The key to this dispute is then whether the word ‘butch’ should be interpreted as ‘detrimental to society’ if used publicly as a trademark. For the plaintiff, the businesswoman Wang Fang, we could not speculate her original purpose of using the word ‘Butch’ – whether for occupying the potential pink market, for impressing those who knew the word, or for any personal reasons. There was no involvement of any LGBT activists in this case, either. However, Wang’s complaints implied that she had some knowledge of homosexuality in China. Notably, she used anti-discrimination arguments, which might be influenced by the litigation in comparative and international law. Unfortunately, such an argument turned out to be rather toothless, partly due to the lack of litigable and enforce-

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76 These are two main reasons why homosexual trademark applications were rejected in the United States. See Llewellyn Joseph Gibbons, ‘Semiotics of the Scandalous and the Immoral and the Disparaging: Section 2 (a) Trademark Law After *Lawrence v. Texas*’ (2005) 9 *Marquette Intellectual Property Law Review* 187-248, 229-230.

able anti-discrimination legislation in China,<sup>77</sup> and anti-discrimination litigation rarely succeeded, with some exceptional cases in recent years where the court rules in favor of the victims of gender discrimination or discrimination against people living with Hepatitis B virus (HBV).<sup>78</sup>

Ironically, lesbian, as a sort of desire, identity or lifestyle, had always been insulated from public discourse, let alone the English term 'butch' – even Chinese lesbians themselves barely know and seldom use this word, because they prefer the vernacular, i.e. 'T' (for Tomboy).<sup>79</sup> The Review Board, while paying little attention to lesbian cultures most of the time (just like most heterosexual customers in China), became particularly sensitive about this unacquainted foreign word, and insisted that it would be detrimental to morality.

The judgment of the Court seems more confusing. It made an 'unhealthy but equal' argument: it considered 'mannish lesbian' as having 'an unhealthy element', but did not consider such decision discriminatory.<sup>80</sup> The court seemed to sincerely believe its judgment to be coherent and justifiable. The crux is the inherent ambiguity of the word 'unhealthy' in Trademark Law. 'Health' is both a medical term and a moral-political one. Although the classification of homosexuality as a separate mental disease

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77 In fact, China does have anti-discrimination provisions, e.g. Article 4 (1) of the Constitutional Law stipulates, 'All nationalities in the People's Republic of China are equal... Discrimination against and oppression of any nationality are prohibited...' and Article 33 'All citizens of the People's Republic of China are equal before the law'. However, the Constitution cannot be directly applied in court cases (See Chapter 6.2). Other anti-discrimination legislation refers only to women, ethnic minorities, the disabled, etc., and none is directly concerned with sexual orientation (however, for a non-binding official interpretation of these laws in a way that is favorable to LGBTs, see Section 6.3.5). The law prohibiting discrimination on the ground of sex can arguably be invoked as the legal basis for the prohibition of sexual orientation discrimination, as it did in *Toonen v. Australia* case (CCPR/C/50/D/488/1992, UN Human Rights Committee, 4 April 1994, para. 8.7), but in China no such argument has been made. For an overview of Chinese anti-discrimination law, see Wei Zhou, *Study on Anti-Discrimination Law: Legislation, Theory and Cases* (反歧视法研究: 立法、理论与案例) (Law Press China, Beijing, 2008).

78 See Tian Yang and Meng-Chao Wu, 'Discrimination against Hepatitis B Carriers in China' (2011) 378 *The Lancet* 1059; see also, Tania Branigan, 'China: Woman Settles in First Gender Discrimination Lawsuit', *the Guardian*, 28 January 2014, at [www.webcitation.org/6ayQD14Ba](http://www.webcitation.org/6ayQD14Ba). For more about anti-discrimination legislation and lawsuits, see Chapter 6.

79 See Elisabeth Lund Engebretsen, 'Lesbian Identity and Community Projects in Beijing: Notes from the Field on Studying and Theorizing Same-Sex Cultures in the Age of Globalization', paper presented at *Sexualities, Genders and Rights in Asia: 1st International Conference of Asian Queer Studies*, Bangkok (2005).

80 In China, there lacks a detailed set of rules on the constitutive elements of discrimination. In comparison, according to the case law of European Court of Human Rights, discrimination is established when there is a different treatment, and the different treatment does not pursue a legitimate aim or there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized. See e.g., *Karlheinz Schmidt v. Germany*, Judgment, ECtHR, 18 July 1994, Series A no. 291-B, 32-33, para 24.

no longer applies since 2001, the depathologization is incomplete.<sup>81</sup> It is unclear what sources the judges used to decide the healthiness of 'butch', but the 2001 diagnostic criteria might have an influence.

It is also possible that the Court's decision was coherent to a mainstream moral reading of 'health' and acceptability of homosexuality.<sup>82</sup> In this sense, the medical meaning of 'health' has already embodied a moral-political judgment and in return reinforced it: homosexuality as a 'disease' has often been deemed as 'threatening social order, undermining youth health and destroys family harmony', and 'a deviation... [of being] unable to keep mental health and work progress'.<sup>83</sup> The reasoning of the court shows how the moralized medical discourses can be closely intertwined with the legal one.

Although women's same-sex desires have always been ignored in law, in this case we can also see the authorities' anxieties about the word 'butch' and about its homoerotic and gender transgressive connotation. However, paradox arises in the attempts to negate the 'unhealthy' trademarks: to silence homosexuality via the language of law, the authorities have to speak loud about it in the first place. In other words, there is probably an unintended consequence of the 'von Butch' case: the Court has to use a lengthy judgment to justify its negation of this trademark, yet in its repeated utterance of 'butch', 'lesbian' and 'homosexuality', visibility and further opportunities to change have been produced from the very denial.<sup>84</sup>

81 Chinese Classification of Mental Disorders (CCMD-3) in 2001 still includes Sexual Orientation Disorders in the section 'Psychosexual Disorders (Sexual Perversions)', see Chinese Society of Psychiatry and Chinese Medical Association, *Chinese Classification and Diagnostic Criteria of Mental Diseases, 3rd edition (CCMD-3)* (中国精神疾病分类与诊断标准第3版). Jinan: Shandong Science and Technology Press, 2001, Section 62.31 and 32. Until now, there are still psychologists and psychiatrists in China trying to 'cure' *tongxinglian*. See e.g., Ah-Qiang, the Roadmap of Curing a Gay Man (一个同性恋者的治疗路线图), *Sina Blog*, 22 February 2008, at [www.webcitation.org/6qWRPvRcf](http://www.webcitation.org/6qWRPvRcf). The activism for depathologization can be found in Chapter 6.

82 Notwithstanding the increasing tolerance in recent years, public hostility against homosexuality in general remains quite strong in China. See Pew Research Centre, 'The Global Divide on Homosexuality: Greater Acceptance in More Secular and Affluent Countries', which shows that only 21 percentage of Chinese people think society should accept homosexuality, 4 June 2013, at [www.webcitation.org/6qWRQnJns](http://www.webcitation.org/6qWRQnJns); see also, World Value Survey carried out in China in 2007, where 68.4% of the respondents would not like to have homosexuals as neighbors, and 78.1% found homosexuality never justifiable, at [www.worldvaluessurvey.org/](http://www.worldvaluessurvey.org/).

83 Quotes from some publications on sexology, see Chou, *Tongzhi* (2000) 111-112.

84 For more analysis of this case in Chinese, see Jingshu Zhu, "'Unhealthy Influences": A Lesbian-Related Trademark Case and the Plight of Chinese Anti-Discrimination Legislation (看不见的"不良影响": 从一起同性恋商标行政纠纷案说起)' in Chen'ge Chu (ed), *Liberty and Its Chains: Legal Issues on Sexual Orientation and Same-Sex Marriage* (Tsinghua University Press, Beijing, 2014).

### 2.2.5 Neglecting Same-Sex Extra-Marital Relationships

Same-sex couples are not entitled to get legally married or registered as civil unions in China.<sup>85</sup> While marriage law spells out the rights and obligation of different-sex couples,<sup>86</sup> in nowhere is same-sex relationship mentioned in positive law. Same-sex couples are unable to access the wholesale legal rights and privileges attaining to marriage, unless they make specific legal arrangements on their own.<sup>87</sup> Meanwhile, married individuals, regardless of their sexual orientation, do not have to assume legal responsibilities when they have same-sex affairs. The lack of both rights and restraints plays an important part of the construction of same-sex-oriented people as family outlaws.

Two provisions in Chinese Criminal Law can illustrate this dual lack: the crime of bigamy<sup>88</sup> and the crime of sabotaging the marriage of army members<sup>89</sup>. Bigamy can only be committed, according to an official interpretation of the Criminal Law, by a man and a woman. It requires that at least one of the two bigamists has already married to someone else while the other knows it, and that they have formally registered as married couple by deceiving the registrar (*de jure* bigamy) or that they do not register but cohabit as husband and wife and are perceived by people around as such (*de facto* bigamy).<sup>90</sup> Since neither in Marriage Law nor in the public's understanding two people of the same sex could be registered or perceived as husband and wife, they cannot commit the crime of bigamy. In the same vein, although theoretically the one who 'cohabits with' the spouse of an army member can be a person of the same sex, the official interpretation has made it clear that in order to amount to 'sabotaging an army member's

85 See Marriage Law of People's Republic of China, adopted 10 September 1980, effective 1 January 1981, amended 28 April 2001 (hereinafter '2001 Marriage Law'). Article 2 uses the term 'a man and a woman'; and Article 5 stipulates, 'Marriage must be based upon the complete willingness of both man and woman'. See also, Regulation on Marriage Registration (婚姻登记条例), adopted by the State Council on 8 August 2003, effective 1 October 2003, Article 4, 'For the marriage between two mainland citizens, the man and the woman shall appear together to go through the marriage registration at the marriage registration organ in the locality where either of the applicants has his/her residence registration'. For the legal advocacy for same-sex marriage, see Chapter 6.

86 See Chapter 3.

87 See Chapters 3, 4, and 5.

88 See 1997 Criminal Law, Article 258: 'Whoever has a spouse and commits bigamy or whoever marries another person while clearly knowing that the other has a spouse shall be sentenced to fixed-term imprisonment of not more than two years or criminal detention.'

89 Ibid, Article 259: 'Whoever cohabits with or marries a person while clearly knowing that the person is the spouse of a member of the armed forces in active service shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention.'

90 Interpretation of Criminal Law of People's Republic of China (3rd edition) (中华人民共和国刑法释义 第三版), Legislative Affairs Commission of the Standing Committee of the National People's Congress (China Law Press, Beijing, 2006).

marriage', the extra-marital relationship has to be equivalent to that of husband and wife in the perception of an average person.<sup>91</sup> Such a requirement has thus excluded same-sex cohabitants from committing this crime.

A similar lacuna appears in marriage law – if a married person has committed bigamy or had cohabited with another person, then his or her spouse may request compensation for mental damages in divorce lawsuits.<sup>92</sup> If interpreted textually, 'another person' apparently would include someone of the same sex with the faulty party; however, in a judicial interpretation given by the Supreme People's Court, 'cohabitation' only refers to 'a married person who continuously and stably lives together with any other person of different sex not in name of husband and wife'.<sup>93</sup>

A case in 2002 confirmed this interpretation. The wife whose husband cohabited with a man was not entitled to mental damage compensation in divorce, because, explained the trial court, 'the act (of same-sex affair) was not listed in Marriage Law'.<sup>94</sup> In a more recent case, after finding out her husband was living with another man, a woman committed suicide. Her parents claimed that the man had fault in concealing his sexual orientation prior to marriage and in having same-sex relations outside marriage, so he should compensate. The court nonetheless turned down their request, by ruling that the man's sexual orientation was not a legal factor that affects the legitimacy of their voluntary marriage registration, and his extra-marital same-sex relations did not directly lead to the woman's death.<sup>95</sup>

In other words, current Chinese marriage law only has heterosexuality in vision. At face value, same-sex-oriented people seem to be set free from the obligation of fidelity that law and morality impose on married heterosexuals, and even from criminal or civil responsibility for transgression. However, such lacuna is not their privilege, but is reinforcing with their abjected status, which leads to the lack of partnership rights in non-adultery

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91 Ibid.

92 See 2001 Marriage law, Article 46, 'a no-fault party shall have the right to make a request for damage compensation under any of the following circumstances bringing about divorce: (1) bigamy; (2) cohabitation of a married person with another person; (3) domestic violence; and (4) maltreatment and desertion of one family member by another.'

93 Interpretation No. I of the Supreme People's Court on Several Issues in the Application of Marriage Law of the People's Republic of China (最高人民法院关于适用《中华人民共和国婚姻法》若干问题的解释(一)), issued by Supreme People's Court on 25 December 2001, effective 27 December 2001, Article 2, emphasis added. Guo has argued that the blindness of homosexuality in law is partly related to the long absence, until recently, of clear and strong moral condemnation of same-sex extra-marital intimacy in folk's commonplace life. See Guo, 'Jurisprudential Analysis of a Same-Sex Prostitution Case' (2004).

94 See 'In Divorce, A Homosexual Does Not Need to Compensate His or Her Spouse' (北京法院判令同性恋者离婚无需对配偶赔偿), *China News*, 26 September 2002, at [www.webcitation.org/6qWRmu1gvlf](http://www.webcitation.org/6qWRmu1gvlf).

95 Notice that according to Article 11 of Marriage Law, 'deception' is not a legal reason for revoking a marriage. For the report of the case, see Brody Levesque, 'China Court Rules Gay Man Who Married A Woman Not Liable for Her Suicide', *LGBTNation*, 8 January 2013, at [www.webcitation.org/6qWSjtWwF](http://www.webcitation.org/6qWSjtWwF).

scenarios. In recent years, the silence surrounding same-sex relationships in law is being broken, especially when more and more women found out their husbands' same-sex affairs and complained about the law's failure to protect them as a no-fault party. These women come out as *tongqis* (literally, wives of gay men), accusing their husbands for their 'marriage fraud (*pian hun*)' and 'womb fraud (*pian zigong*)'.<sup>96</sup>

Having dealt with an increasing number of divorce cases concerning such mixed-orientation marriage, the Beijing First Intermediate People's Court published a report in 2013.<sup>97</sup> This report unequivocally takes up the cause of the presumably straight *tongqis*. It proposes that such marriages should be wholly revocable, so that the official legal status of a *tongqi* becomes 'unmarried' rather than 'divorced'. The court explicitly states that this would 'do justice' to many *tongqis* who are still virgins after separation. The court further supports the right of a *tongqi* to claim mental damage compensation from her gay spouse. It also holds that it is 'reasonable' and 'undisputable' to grant the spouse of 'normal sexual orientation' a larger portion of joint property in divorce lawsuits.<sup>98</sup>

Although hailed by the *tongqi* groups, the recommendations in the report are flawed in many ways. To begin with, there is no legally applicable standard to test or prove if one is homosexual, so the recommendations are hardly feasible. The court's paternalistic tune also supports the idea that non-virgins are 'devalued', which was in fact part of the reason why many *tongqis* did not dare to check their fiancés' sexual preference in the first place. The stigmatization of female divorcees also contributes to, rather than solves, women's reluctance to divorce when their marriages are unsatisfactory. Moreover, the report expands the condition of revocable marriage from 'coercion' to 'fraud', without differentiating the nature and consequences of the two behaviors.<sup>99</sup> It conflates 'no-fault' with 'normal sexual orientation' and 'fault' with 'gay', which is apparently biased. The dichotomy of

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96 More discussion of 'marriage fraud' and 'womb fraud' can be found in Sections 3.3 and 4.4.

97 Beijing First Intermediate Court, 2013, *Report on the Divorce Cases Concerning Homosexuals* (离婚案件中涉同性恋诉求裁处的调研).

98 In the 2001 Marriage Law, granting a larger portion of joint property to one party only happens in certain scenarios, i.e., if the other party 'conceals, transfers, sells off, destroys the couple's joint property, or forges debts' (Article 47). Other faults in the law, including bigamy or cohabiting with another person do not result in a disadvantage in joint property division.

99 The reasons why fraud should be differentiated from coercion can be drawn from the discussion of rape-by-deception, see Jed Rubenfeld, 'The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy' (2013) 122 *The Yale Law Journal* 1372-1443. There, Rubenfeld prefers the test of 'self-possession' over 'sexual autonomy', thus differentiating rape by coercion (physical incapacitation or the threat of it) from sex under conditions of power imbalance, material want, or psychological pressure. Arguably, the rationale of Chinese Marriage Law's narrow scope of revocable marriage is also an acknowledgement of the complexity and ambiguity of 'marriage-by-deception', as opposed to a more clear-cut deprivation of self-possession in case of coerced marriage.

normal versus gay also erases cases of bisexuality and sexual fluidity. Also, the court only sees mixed-orientation marriage as a gay man marrying and harming a straight woman and aims to 'protect women', without discussing if a lesbian marrying a straight man should be 'protected' as a woman or disadvantaged as a homosexual. Furthermore, it ignores the possibilities of different power dynamics between two spouses, whose gender and sexuality may not play the central role in their marital life.<sup>100</sup> These points will be further unpacked in Chapters 3 and 4 with real-life stories.

The court's report is not binding, and there has not been any written divorce judgment that grants *tongqis* mental damage compensation based on the 'fault' of the alleged homosexual spouse. However, in some pre-trial divorce mediation cases that do not have to be settled strictly pursuant to the law, the 'faulty homosexual party' did pay large amount of compensation to their wives.<sup>101</sup> This indicates that the *tongqis*' demand for legal punishments for 'gay frauds' has already influenced the enforcement of Marriage Law, without changing it formally.

In these cases, it is through their tension with heterosexual marriages that same-sex relationships are brought to light. With the increasing voice of *tongqis*, the Chinese Marriage Law and the adjudicators can no longer ignore same-sex extra-marital affairs. The difficulty is, however, in order to maintain the logical consistency of law, liabilities, rights and obligations should go hand-in-hand. This has placed the law-makers in a dilemma: If 'faulty' extra-marital same-sex affairs should be regulated by the Marriage Law, what about those same-sex relationships that do not interfere with monogamous different-sex marriage? Currently, courts have been shunning away from this dilemma by using vague wording and giving inconsistent decisions.<sup>102</sup> As the visibility of both gay men and *tongqis* continues to rise, such silence is expected to be broken in the foreseeable future.

### 2.3 CONCLUSION

Chinese law renders homosexuals 'family outlaws' through various tactics. Family outlaws refer to the non-normative subjects who are deemed sexually deviant and socially untamed, thus unfit for family and bad for children. The deviancy and unfitness of homosexuals are announced, explicitly or ambiguously, mostly in FL3, i.e., laws that contribute structurally but silently to the environment in which family life is lived: The criminal and

100 For a more elaborate analysis of this report, see Hao Wang, 'A Critique on the Common-sense Approaches on "Homosexuals' Marriage Fraudulence" 批判"同性恋骗婚说"的常识进路' *Caixin*, 16 January 2013, at [china.caixin.com/2013-01-16/100483492\\_all.html](http://china.caixin.com/2013-01-16/100483492_all.html).

101 See e.g. 'Marrying A Gay man, Having No Conjugal Sex, A Woman Obtained 800 Thousand Compensation After Divorce (女子嫁同性恋男子 未能同房起诉离婚获赔偿80万)', *STCN*, 15 August 2014, at [www.webcitation.org/6qWTD5gDN](http://www.webcitation.org/6qWTD5gDN).

102 See Sections 3.3 and 4.4.

administrative rules, including the penalization of commercial or group same-sex sexual behaviors, have marked homosexuality as deviancy, even after the repeal of the hooliganism crime and the *jijian* clause in it. The laws on public health, including HIV/AIDS and blood donation, while repeatedly announcing MSM as riskier than heterosexuals, encourage them to become useful citizens via peer education. The symbolic erasure of same-sex representations and signs, whether in films or on trademarks, has made both the sexual and non-sexual aspects of same-sex-oriented people's life hardly visible in public. The legal barriers of registering LGBT NGOs obstructs them from coming together.

Interwoven with the official laws are the homophobic moral and medical discourses appropriated by the legislatures, courts and governments, suggesting the prevalence of FL4 norms that permeate the written law and legal arguments. For instance, in the 'Von Butch' case, the ambiguous provision in the Trademark Law about 'socialist morals' and 'customs' necessarily requires the judges to take into account the negative images of homosexuality in mainstream society. And the concept 'health' is used as both a medical and moral one when the judges interpret the term 'unhealthy influence' in the same law.<sup>103</sup>

In this chapter, we have also had a glimpse of FL1 (especially the Marriage Law), which produces family outlaws not by delegitimizing or demoralizing homosexuality, but by turning a blind eye on sexual orientation, even when extra-marital same-sex relationships disturb the monogamous principle of a heteronormative marriage. This is a crucial legal factor that leads to the antagonizing of *tongqis* and their same-sex-oriented husbands. More details of FL1 and 2, as well as the *tongqi* phenomenon, will be discussed in the next three chapters.

Importantly, if we followed Foucault's idea that power can yield unexpected consequences,<sup>104</sup> then discipline and punishment do not always end up curbing same-sex-oriented people's behaviors, representation, relationships and association. Let me recall some unintended effects discussed in this chapter: the arrest of the parade organizer created more opportunities for advocacy in jail and in media;<sup>105</sup> the erasure of the 'butch' trademark is preconditioned on the repetitive articulation and meticulous analysis of this word in the judgment;<sup>106</sup> and the law's ignorance of same-sex extra-marital relationships puts the courts and lawmakers into the *tongqi* dilemma, forcing them to say '*tongxinglian*' out loud and to find some solutions, the whole dynamics of which is already reshaping the institutional and cultural meaning of marriage.<sup>107</sup> Power in these cases is not only repressive but

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103 See Section 2.2.4.

104 Foucault, *The History of Sexuality* (1978), 101.

105 See Section 2.2.2.

106 See Section 2.2.4.

107 See Section 2.2.5.

also productive, and as it will be shown in Chapter 6, the new knowledge, identities and discourses produced in the very regulation of homosexuality are also actively participating in changing the legal landscape.

The next three chapters take a closer look at how Chinese same-sex-oriented people, situated in and interacting with the above-described legal environment, deal with Family Law with/out fitting in the straightjacket. Through legal doctrinal analysis and empirical research, I will elaborate how people arrange their partnership, parenthood and old age in contemporary mainland China, in what forms of relationships, with what legal consciousness and feelings.



Let us recall the metaphor of straightjacket, i.e., the life trajectory of getting married, becoming parents and obtaining eldercare from one's offspring. This chapter focuses on the entry point of this 'straight' path – marriage. Two points deserve highlight from the start. Firstly, although one may choose to refuse to marry or leave a marriage, there is no utter 'outside' of it, but only 'social positions that are defined in terms of their proximity to and stake in marriage'.<sup>1</sup> In other words, the institution of marriage and its norms are always circumscribing non-normative life, and the shadow of marriage law reaches much further than conjugality. The never married, the not-yet married, the divorced and the widowed, regardless of their sexual orientation, remain highly regulated by the legal and social norms of marriage, including its form of sociality and its value of commitment.<sup>2</sup> As a convenient expression, the 'outside' used in this chapter simply refers to those who are not legally married.

Secondly, as much as marriage is about social status and intimate feelings, the economic and material aspects of it should not be underrated. Contemporary governmentality in a Foucauldian sense is oftentimes 'a question not of imposing law on men, but of disposing of things'.<sup>3</sup> This reminds us to interrogate the inequality produced by the heteronormative marriage law not simply as a lack of recognition for same-sex couples, but also as an institution that buttresses unjust redistribution of economic resources.<sup>4</sup> In this chapter, therefore, I will pay particular attention to how law's disposing of property, especially of real estate, is embodied in same-sex-oriented people's perceptions, feelings and acts in relation to law.

The following text first explains via some written laws and court cases the ambivalent functions of marriage as part of the straightjacket: decent-looking, warm-keeping yet restraining, which serves both normative and

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1 Katherine M Franke, 'Longing for Loving' (2008) 76 *Fordham Law Review* 2685-2707, 2696.

2 Ariela R Dubler, 'In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State' (2003) 112 *The Yale Law Journal* 7, 1641-1715.

3 Michel Foucault, 'Governmentality', in Graham Burchell and Colin Gordon Peter Miller (eds) *Foucault Effect: Studies in Governmentality: With Two Lectures by and an Interview with Michel Foucault* 89-104 95 (1991); Dean Spade, 'Laws as Tactics' (2011) 21 *Columbia Journal of Gender and Law* 442-473, 457.

4 For the relations between recognition and redistribution, see Nancy Fraser, 'From Redistribution to Recognition? Dilemmas of Justice in a "Post-Socialist" Age' (1995) 212 *New Left Review* 68-93; 'Rethinking Recognition' (2000) 3 *New Left Review* 107-120. See also, the 'family-market continuum' discussed in Section 1.2.

pragmatic purposes (Section 3.1). Next, with rich ethnographic materials, I take a closer look at how Chinese same-sex-oriented individuals and people related to them negotiate their rights and make compromises inside or outside marriage (3.2, 3.3, and 3.4). In the end, I discuss how Family Law (FL) 1, 2, 3, and 4<sup>5</sup> work together to influence people's marriage-related decisions, and how the various forms of legal consciousness about marriage, whether obedience, utilization or resistance, have all contributed to re-tailoring marriage (3.5).

### 3.1 LAW'S CONTRIBUTION TO THE STRAIGHTJACKET OF MARRIAGE

Notwithstanding its alluring promise of a happily-ever-after life, marriage as part of the straightjacket hardly pleases everyone. It often disparages those who are outside of it, while suffocating those who are inside; yet one needs courage and economic recourses to live without. More specifically, the straightjacket dilemma manifests in the following aspects:

- 1- Many people in China, regardless of sexual orientation, are pressured to get married with a person of the different sex in order to be 'as normal as possible'<sup>6</sup>;
- 2- Same-sex-oriented people do not have the right to marry their same-sex partners, thus not being able to enjoy the rights and privileges granted to married couples, nor are they qualified to take marital responsibilities such as property share and mutual care;
- 3- Despite its aspirations, marriage often fails to be simultaneously loving, faithful, sexually fulfilling and economically secure, and such failure has already been acquiesced by the law and the courts in a pragmatic manner;
- 4- As an institution with gendered traditions, marriage often disadvantages women in and outside of it, although the power relations can be more nuanced than 'man > woman'<sup>7</sup> in concrete cases.

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

6 This term is first elaborated in Ching Yau, 'Dreaming of Normal While Sleeping with Impossible: Introduction' in Yau Ching (ed), *As Normal As Possible: Negotiating Sexuality and Gender in Mainland China and Hong Kong* (Hong Kong University Press, Hong Kong, 2010).

7 This formula is borrowed from Janet E Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton University Press, Princeton, 2006).

The literature on Chinese society's marriage imperative in general is abundant,<sup>8</sup> so is the discussion on same-sex-oriented people's pressure to marry.<sup>9</sup> In this section, I will elaborate the latter three points, with reference to FL1, 2, 3 and 4, i.e., the cluster of statutes, legislative and judicial interpretations, court cases, gender and sexual norms, and widely accepted cultural practices in relation to marriage in China.

### 3.1.1 A Warm-Keeping Jacket: Institutional Benefits of Marriage

In Chinese law, numerous rights and privileges are granted to different-sex marriage and the kinship system centered around marriage. Although one seems fully free not to marry, the compulsory and seductive nature of these benefits makes such freedom less desirable or attainable. For instance, spousal visitation leave is granted to different-sex married employees only, and bereavement leave is applicable only when one's direct relative (*zhixi qinshu*, namely, spouse, parents and children) deceases;<sup>10</sup> when changing from single ownership of a real estate into co-ownership, spouses are exempted from the burdensome deed tax;<sup>11</sup> and upon dissolution, statutory rules on alimony would apply to guarantee the rights of the child and the economically weaker party.<sup>12</sup>

8 See e.g., Leta Hong Fincher, *Leftover Women: The Resurgence of Gender Inequality in China* (Zed Books, London, 2014); Luzhou Li, 'If You Are the One: Dating Shows and Feminist Politics in Contemporary China' (2014) *International Journal of Cultural Studies* 1-17.

9 See e.g., Wah-Shan Chou, 'Homosexuality and the Cultural Politics of Tongzhi in Chinese Societies' in Gerard Sullivan and Peter A Jackson (eds), *Gay and Lesbian Asia: Culture, Identity, Community* (Harrington Park Press 2001); Elisabeth Lund Engebretsen, *Queer Women in Urban China: An Ethnography* (Routledge, New York, 2014); Travis SK Kong, 'The Sexual in Chinese Sociology: Homosexuality Studies in Contemporary China' (2016) *The Sociological Review* 1-20. These scholars have all discussed how the society and family impose pressure on Chinese same-sex-oriented people to get married and carry on the blood line. More discussion of the reproductive pressure will appear in Section 4.1.

10 There is no statutory law on employees' family leave, but for those working for the state-owned enterprises, there is the Regulation of State Labor Bureau and Ministry of Finance Concerning the Marital, Bereavement and Traveling Leave for the Employees in State-owned Enterprises (关于国营企业职工请婚丧假和路程假问题的通知), issued and effective on 20 February 1980, Articles 1 and 2; see also, Resolution of the Standing Committee of the National People's Congress Approving the Provisions of the State Council for Home Leave for Workers and Staff (全国人大常委会关于批准《国务院关于职工探亲待遇的规定》的决议), issued and effective on 6 March 1981, Articles 2 and 3 (1).

11 See Notice of Ministry of Finance and National Tax Bureau concerning the Deed Tax of Changing the Ownership Estate or Land from One Party of a Spouse to Co-Ownership (关于房屋土地权属由夫妻一方所有变更为夫妻双方共有契税政策的通知), issued and effective on 31 August 2011.

12 See Chinese Marriage Law, Article 42: 'If, at the time of divorce, one party has difficulties supporting himself or herself, the other party shall render appropriate help from her or his personal property such as a dwelling house.'

In criminal proceedings, the family members of a suspect shall be notified within 24 hours after he is detained or designated for residential surveillance.<sup>13</sup> According to the relevant law and administrative regulation, only 'relatives or guardians' can visit the detainees.<sup>14</sup> The political environment in China has made marriage particularly relevant in terms of the safety of feminist and queer activists, or human rights activists in general. For instance, when one of five feminists, Li Maizi, was in detention in March 2015, her same-sex partner Lu Manman<sup>15</sup> was not allowed to send money or clothes to her, nor could she visit her as a family member. This encounter has pushed them to have a wedding after Maizi was released. Although the wedding does not entail any legal consequences, they did so to express their mutual affection, as well as their discontent with the heteronormative marriage law and prison visitation law.<sup>16</sup>

The rights and privileges of a married couple in terms of parenthood and eldercare are numerous, too, which will be elaborated in the next two chapters. Here I put more emphasis on property arrangements, especially the laws and policies on house ownership. Married couples often enjoy legally endorsed conveniences in buying houses. For instance, according to the 2016 housing policies in Shanghai, unmarried persons with local residence permit can only purchase one residential house, whereas a local family, defined as parent(s) with their minor child(ren), is eligible for two. Moreover, people who are not local Shanghai residents should not only have paid tax for five years in this city but also been married, in order to be qualified for house-purchasing.<sup>17</sup> Although one of the purposes of these policies may be to prevent speculation in the real-property market and to control intra-state immigration, they also regulate the unmarried citizens by making marriage a crucial dividing line. Notice that here one's marital status also intersects with their socio-economic status and place of origin, all of which are contributing to the precarious life of thousands of houseless unmarried non-locals in the metropolises. Such precarity further legitimizes the subsisting and sheltering function of marriage.

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13 See Criminal Procedure Law of the People's Republic of China, adopted 1 July 1979, revised on 14 March 2012, effective 1 January 2013, Articles 73 and 83.

14 Prison Law of the People's Republic of China, adopted and effective 29 December 1994, Article 48. As a reference to comparison, in the case *Petrov v. Bulgaria* (2008) ECHR 15197/02, the applicant claimed that while in prison, he had been prevented from talking on the telephone with his unmarried partner. The Court found this policy discriminatory to unmarried partner with whom the prisoner has an 'established family life' (para. 53).

15 These are their names shown in media coverage.

16 See Section 3.2.2.

17 See Notice on Several Opinions on Promoting the Steady and Healthy Development of the Housing Market, Shanghai Municipal Government, issued and effective 24 March 2016, No.11 (市政府办公厅转发市住房城乡建设管理委等四部门,关于进一步完善本市住房市场体系和保障体系促进房地产市场平稳健康发展若干意见的通知,沪府办发(2016)11号).

The close linkage between marriage and house is manifested not only in policies, but also in people's daily life. In contemporary China, although romance has been increasingly valorized as the precondition for a moral and happy marriage,<sup>18</sup> a house is still an important economic and emotional guarantee for a reliable, long-lasting conjugal relationship. In practice, parents often pay part or all of the down payment of a house and/or its decoration for their newly married adult children, which serves multiple functions: it is a financial investment in times of skyrocketing house price, a gesture of intergenerational care within a family, as well as a sign of strengthened affinity between two families.<sup>19</sup> In this 'gift-giving'<sup>20</sup> process, the connection between property ownership, marriage, kinship and social decency is reified.

### 3.1.2 An Uncomfortable Jacket: Law's De-Romanticizing of Marriage

Although the straightjacket of marriage is for many people a subsisting necessity, it does not feel as comfortable as it promises. The promises of a modern marriage often sound ambitious:

'Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.'<sup>21</sup>

This is one of the most frequently quoted words about marriage in the United States, which Justice Douglas eloquently argued in the *Griswold v. Connecticut* case in 1965. Similarly, in the landmark case on same-sex marriage in 2015, namely *Obergefell v. Hodges*, Justice Kennedy glorified marriage with words like 'of transcendent importance', 'nobility and dignity', 'sacred', 'offer(ing) unique fulfilment', 'essential to our most profound hopes and aspirations'.<sup>22</sup>

18 See e.g., Yunxiang Yan, *Private Life under Socialism: Love, Intimacy and Family Change in a Chinese Village 1949-1999* (Stanford University Press, Stanford, 2003) 83-84.

19 For the investing and kinship-strengthening functions of the marital house, see Yan R Xia and Zhi G Zhou, 'The Transition of Courtship, Mate Selection, and Marriage in China' in Raeann R Hamon and Bron B Ingoldsby (eds) *Mate Selection Across Cultures* 231-246 (SAGE Publications, Thousand Oaks, London, New Delhi, 2003); Antonia Chao, 'Moving House: The Relational-Materialistic Aspect of Queer Cultural Citizenship' (2002) 57 *Taiwan: A Radical Quarterly in Social Studies* 41-85.

20 I use quotation marks because many anthropological works on gift-giving have argued that the idea of a 'pure gift' is a contradiction. Parents' willingness to buy house for adult children is partly built on the expectation for eldercare in return. See Marcel Mauss, *The Gift: The Form and Reason for Exchange in Archaic Societies* (Routledge, London and New York, 2002); Antonia Chao, '(In)Calculable Intimacies: Moving House Thrice Visited' (2010) 80 *Taiwan: A Radical Quarterly in Social Studies* 3-56.

21 *Griswold v. Connecticut*, 381 Supreme Court, United States, 479 (1965).

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

In comparison, Chinese judges are far less poetic and utopic in their understanding of marriage. Despite the rising ideal of marriage that bundles romantic love, passionate sex and conjugal fidelity in China,<sup>23</sup> the pragmatic laws and courts do not always pamper this dream. To start off, hetero-romantic love has never been a must to establish or maintain a lawful marriage in China. According to the existing Chinese Marriage Law, although ‘the complete breakdown of spousal affection’<sup>24</sup> is the only criterion to grant a divorce in case of disagreement between spouses,<sup>25</sup> in many situations a mere lack of romantic love does not amount to the extinguishment of spousal affection. Instead, Chinese courts often find a ‘tolerable relationship’<sup>26</sup> good enough for a marriage to sustain.

To quench a spouse’s request to divorce, the courts frequently reason with the following words: ‘the foundation of marriage is solid since the two parties entered into marriage by free will’; ‘they have already held a wedding and lived together for a substantial period of time’; ‘although they do have some small fights, their marital life is tolerable’, and so on.<sup>27</sup> The rhetoric of the judges is often paternalistic and admonitory: ‘marriage is an important life event, which should not be treated as a child’s play’; ‘the parties should cherish marriage and family, and should think more about the child’; ‘daily trifles would always influence the solidarity between a couple, but this is a common phenomenon’; or ‘as long as they tolerate each other, it is possible for them to reconcile’.<sup>28</sup>

The law’s de-romanticized attitude towards the mundane marital life is also manifested in the procedural barrier of divorce lawsuit. As an unwritten rule, if there is no evidential fault on any party, and if the defendant insists on not divorcing, the courts would often reject the applicant’s first divorce request, and would only grant a divorce after the applicant sues again six months later. The assumption is that the conjugal affection in such ‘tolerable’ marriages may still sustain or even revive during these months.

Likewise, a lack of satisfactory sex life is not always seen as detrimental to marriage, although the attitudes of the judges vary, especially when it comes to the allegation that the husband is gay. In one case, the court held,

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23 For the rising of such marriage ideal, see Yan, *Private Life under Socialism* (2003); see also, Suiming Pan and Yingying Huang, ‘The Rise of Rights and Pleasure: Towards A Diversity of Sexuality and Gender’ in Kaining Zhang (ed) *Sexual and Reproductive Health in China: Reorienting Concepts and Methodology* 215-262 (Brill, Leiden, 2011).

24 The Chinese words are ‘感情彻底破裂’.

25 2001 Marriage Law, Article 32.

26 The Chinese words are ‘感情尚可’.

27 For instance, *Li v. Guo*, Zhangdian Trial Court, Zibo, Shandong (2014), No. 3750 (李某与郭某离婚纠纷一案民事判决书, 山东省淄博市张店区人民法院 (2014)张民初字第3750号); *Hou v. Long*, Xiangtan Trial Court, Hunan (2014), No. 1700 (侯某某诉龙某某离婚纠纷一案一审民事判决书, 湖南省湘潭县人民法院 (2014) 潭民一初字第1700号).

28 *Ibid.*

'...in the recent two years the couple have never had sex, and the rumors on the Internet (about the husband's homosexuality) greatly hurt the plaintiff (the wife). The marriage exists in name only, so the spousal affection is indeed broken... Therefore, the court allows them to divorce'.<sup>29</sup>

In contrast, another court downplayed the claim of the wife that her husband had not even held her hand for three years, and that she found gay porn in his computer. Instead, the court emphasized the voluntary decision of hers at the time of entering into marriage and encouraged them to communicate more so as to save their marriage.<sup>30</sup> In yet another case, the 'unfaithful relationship' between the wife and another woman was not considered by a court as a determining factor to grant a divorce, either, probably due to the invisibility of lesbian love and sexuality or its perceived low threat to a different-sex marriage.<sup>31</sup>

Just like its half-hearted endorsement for conjugal love and sex, Chinese Marriage Law does not idealize fidelity, either. While the party who cohabits with a person of the different sex outside marriage is legally at fault and is liable for mental damage compensation in divorce, occasional extra-marital sex that does not amount to cohabitation would not incur disadvantageous economic consequences. In practice, some married couples have signed a 'loyalty agreement' that punishes the infidel party. However, neither the Marriage Law and its judicial interpretations nor the Contract Law has made it clear whether such agreements are legally enforceable.<sup>32</sup> The Supreme Court refrained from giving a definite answer with regard to the validity of loyalty agreements,<sup>33</sup> while local courts' opinions diverge.<sup>34</sup> On the other hand, a same-sex affair, even long-term same-sex extra-marital

29 *Wang v. Zhou*, Xixia Trial Court, Henan, 2014, No.21 (王某与周某甲离婚纠纷一案一审民事判决书, 河南省西峡县人民法院 (2014) 西峡民初字第21号).

30 See *Bao v. Yu*, Hongkou Court, Shanghai, 2014, No. 4643 (包某某与俞某某离婚纠纷一案民事判决书, 上海市虹口区人民法院 (2014) 虹民一初字第4643号); See also, *Guo v. Liu*, Xiangtan Court, Hunan, 2014, No. 1483 (郭某诉刘某某离婚纠纷一案一审民事判决书, 湖南省湘潭县人民法院 (2014) 潭民一初字第1483号), where the courts did not find the marriage intolerable despite the suspected homosexuality of the husband.

31 See *Yu v. Ni*, Xiaoshan Court, Hangzhou, 2014, No. 400 (俞某甲与倪某离婚纠纷一案一审民事判决书, 杭州市萧山区人民法院 (2014) 杭萧义民初字第400号). For the neglecting of and accordingly the relatively less social control on female-to-female love and sexual relationships, Tze-Lan D Sang, *The Emerging Lesbian: Female Same-Sex Desire in Modern China* (University of Chicago Press, Chicago and London, 2003).

32 For more discussion, see Deborah S Davis, 'Privatization of Marriage in Post-Socialist China' (2014) 40 *Modern China* 6, 551-577, 560.

33 *Ibid.*

34 For instance, in *Zhong v. Liu*, Rizhao Court, Shandong, 2014, No. 835 (上诉人仲某某与被上诉人刘某某离婚纠纷一案, 山东省日照市中级人民法院 (2014) 日民一终字第835号), the court did not recognize the legality of the loyalty agreement because it does confine one's legal freedom to divorce. In another case, *Xing v. Li*, Changan Court, Shanxi, 2013, No. 01184 (邢某某与李某某离婚纠纷一案, 陕西省西安市长安区(县)人民法院 (2013) 长民初字第01184号), however, the local court decided otherwise.

cohabitation, does not have the same legal consequences, since the existing heteronormative Marriage Law is blind to its existence.<sup>35</sup>

In sum, Chinese courts' pragmatic judgments have already compromised the ideal that marriage should be loving, sexy and faithful in order to sustain. In fact, these unromantic judgments are not difficult to swallow for many people who are in an unexciting but tolerable marriage. Many of these marriages are long-lasting because of other concerns than love, sex and commitment, such as house, welfare, common causes, companionship, habits, economic conveniences, childrearing, social decency, the fear of ageing alone without care, etcetera. The marriages involving at least one same-sex-oriented person, be it mixed-orientation 'fraudulent' marriage or cooperative marriage, have further exposed the mundane aspects of the straightjacket, to which I will come back later in Section 3.3.

### 3.1.3 A Gendered Jacket: Chinese Women and the 'New' Marriage Law

The warm-keeping and restraining effects of the straightjacket of marriage do not always arouse the same feelings in men and women, considering marriage's deeply embedded gendered traditions in both statutes and social norms. Chinese Marriage Law aspires to protect the rights and interests of women, children and elders, especially in case of divorce.<sup>36</sup> However, the 2011 Interpretation of the Marriage Law<sup>37</sup> is often considered as having made marriage even more disadvantageous for women than before. Although the terms of the Interpretation are gender-neutral, the prevalent beliefs and practices regarding marriage and property have driven the law towards an imbalanced direction. For instance, it is a common practice in China that the parents of the young man pay for the major part of his conjugal house and those of the wife for the decoration and furniture in it. This house used to be deemed as communal property of the married couple regardless of whose name is on the official real-estate registry. The 2011 Interpretation nevertheless makes it clear that even if the house is bought during marriage, if it is only paid by the parents of the husband, it belongs only to the man unless the wife's name is explicitly put on the registry.<sup>38</sup>

I will not go through the provisions of the Marriage Law and its judicial interpretations, but present some excerpts of a commentary that has gone viral online about what is mistakenly called the 'new marriage law'. These words may better illustrate ordinary people's perception of the gendered features of marriage.

35 See above, Section 2.2.5.

36 Articles 2, 29 and 42, Marriage Law. For more discussion, see Michael Palmer, 'The Re-Emergence of Family Law in Post-Mao China: Marriage, Divorce and Reproduction' (1995) 141 *The China Quarterly* 1995, 110-134.

37 Interpretations of the Supreme People's Court about Several Issues Concerning the Application of the Marriage Law of the People's Republic of China (III), adopted 4 July 2011, effective 13 August 2011. Hereinafter 'the 2011 Interpretation'.

38 Article 7 of the 2011 Interpretation.

Title: Girls, You Should Defend Yourselves Under the New Marriage Law

If your husband's parents pay for your conjugal house, and put it under the name of their son, the house belongs to your husband only, no matter it was purchased before or after marriage.

If the conjugal house is bought before marriage by your husband, the increment of its market value is irrelevant to you.

....

So girls, you should forget about your gender, forget that you should take care of your husband and child, and devote yourself whole-heartedly to your work.

You must buy your own house, even if you have to borrow money from your parents or friends.

Don't marry a man who has paid the down-payment of a house but asks you to pay half of the mortgage with him...<sup>39</sup>

As shown above, the 2011 Interpretation is believed to have 'made men laugh and women cry', because, some mourn, wives who live in the conjugal house bought by the husband or his family are now treated no more than a 'tenant' who pays the rent with sex and her domestic labor, a 'nanny', or a 'birth machine' that might be disposed of at the man's wish when she devalues.<sup>40</sup> Consequently, some women worry that the new rules would encourage men to seek for extra-marital affairs, since the cost of divorce is low, especially when the house is now the individual property of the man. At the same time, women are discouraged to leave an unhappy marriage because a middle-aged houseless single mother may not be the most attractive candidate in the dating pool.<sup>41</sup>

Meanwhile, real estate developers find it a good opportunity to encourage women to be economically independent and buy their own property to guarantee their financial security. Such a neo-liberal idea imposes a 'Catch-22' on women in workplace: they have to be hardworking to make enough money to buy a house, while they are also pressured to be good wives and mothers.<sup>42</sup> Similarly, although the 2011 Interpretation seems to encourage spouses to buy a house together during marriage and to split the costs in an egalitarian way, it still underestimates the unpaid housework, a larger part of which is often done by the wives,<sup>43</sup> making economic independence a more onerous task for women than men.

39 Wandou Gongzhu, 'How Should Girls Self-Defend under New Marriage Law?' (新婚姻法下女孩子如何自卫), *Douban*, 7 September 2013, at [www.webcitation.org/6oc94rCac](http://www.webcitation.org/6oc94rCac).

40 Tencent, 'Third Interpretation of Marriage Law: Making Men Laugh and Women Worry' (婚姻法解释三:男人笑 女人愁?), *Tencent Legal Perspective*, 13 August 2011, [www.webcitation.org/6eP9jxYvD](http://www.webcitation.org/6eP9jxYvD).

41 Ibid.

42 For the discussion of the Catch-22 on women, see Joan C Williams and Nancy Segal, 'Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job' (2003) 26 *Harvard Women's Law Journal* 77-162; Kenji Yoshino, *Covering: The Hidden Assault on Our Civil Rights* (Random House, New York, 2006).

43 See Jiping Zou and Yanjie Bian, 'Gendered Resources, Division of Housework and Perceived Fairness: A Case in Urban China' (2001) 63 *Journal of Marriage and the Family* 4, 1122-1133.

The warnings in articles like the above-mentioned one may sound too cold-hearted, especially for those who lament that people have put too much emphasis on the calculation of interests in marriage and too little on affection, sacrifice and mutual care. However, the fact that these ideas do become widespread at least suggests that more and more ordinary people have started to wonder how romantic and gender-equal a marriage really is, and how women can empower themselves to have more bargaining chips<sup>44</sup> inside or outside marriage.

Of course, as I will exemplify in the next sections, it is over-simplistic to allege in general terms that men always win and women always lose in the hetero-patriarchal institution of marriage, which loses sight of the complexities in each couple. However, bearing the gendered features of marriage in mind, we may better understand why mixed-orientation marriage can be more unbearable for a straight wife than a straight husband, which will be elaborated in Section 3.3.2 and 3.4.2. Before examining the life within such straightjacket, let us take a closer look at the same-sex-oriented people who try to live their single or partnered life without stepping into different-sex marriages.

### 3.2 UNMARRIED SAME-SEX-ORIENTED PEOPLE ENCOUNTERING FAMILY LAW

Facing the enormous pressure to marry, some same-sex-oriented people remain outside the institution. While some are hesitating, some stoutly refuse to be co-opted into a different-sex marriage of any kind. The latter would rather give up certain legal and cultural benefits of the married status, in exchange for their preferred relationship forms and lifestyles. Amongst them, many do want to marry their same-sex partners or get their partnership officially recognized in a certain way, but are not granted the right to do so. They then create some ways to validate and strengthen their relationships, by legal and/or non-legal means. This section looks at various legal consciousness and practices of same-sex-oriented people outside marriage, including their resistance tactics, their creative ritual and economic arrangements, as well as the disputes in court.

#### 3.2.1 Coping with Marriage Pressure

As discussed above, the 2011 Interpretation of Marriage Law is widely perceived as making women more economically vulnerable. Some lesbians, like other unmarried straight 'leftover' women, find the law provides them good arguments to resist the pressure to marry a man. As they know more about the law, they have more sound reasons to defy their parents' wish.

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44 The term is borrowed from Lewis Kornhauser and Robert H Mnookin, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 *Yale Law Journal* 950-997.

A respondent, Lemon, a well-educated lesbian with a well-paid job, said,

'My parents are less educated than I am, so I kept "brainwashing" them about the unfairness of our marriage law, and sometimes they did buy it. I told them that the law's already made marriage unreliable. If I married a man, I would have to pay mortgage for his house, take care of him and his parents, and spend less time with mine. And in case I got divorced, I might end up homeless and get only a small amount of reimbursement, and all the sacrifices I had made for the marriage would just be in vain... Of course, my parents often said that I overrated the negativity of marriage, but gradually they nagged less.'

In contrast, some lower-class lesbians refuse marriage more straightforwardly, by coming out to their parents and decisively expressing their disinterest in marrying a man. This might be counter-intuitive, as people often assume rural parents to be less 'progressive' and more homophobic than urban ones.<sup>45</sup> However, as Fang, a blue-collar lesbian in her thirties, said,

'Since I left my hometown to work in Beijing since young, I have become economically independent, and my parents can hardly interfere with my private life from afar. Moreover, after my mum died, my dad had to rely on me to provide for his elderly life, so as long as I send him money back, he would not have many grudges on me being unmarried, although he is obviously not happy with my orientation.'

Some gay respondents tend to resist marriage by referring not directly to the laws, but to the gender norms in marriage that, apart from some benefits, give men enormous pressure to be financially well off. Mo, a 28-year-old gay man, tried to convince his parents that he would not consider getting married before he secures a better job, a residence permit (*hukou*), a car and a house in Beijing, which is often deemed as a basic package of being a competitive man in the match-making market. He pretended to complain to his parents that urban girls nowadays are so superficial that they would not date a poor guy. Although he acknowledged that this is only a temporary excuse, and although his parents were still trying to arrange some dates for him in his hometown where the standards are lower, his alleged aspiration to be more successful in Beijing sounds persuasive to his parents, which mitigated, or at least postponed, the marital pressure.

### 3.2.2 Rituals and Property Arrangements

Although the Marriage Law does not recognize cohabiting same-sex couples, some of them are trying to make their relationship socially perceived as a 'real' marriage, at least ritually. Having a same-sex wedding can be a cultur-

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45 I appreciate the discussion with PhD candidate Liu Tingting on this point, who has done more intensive ethnographic research on the love life of migrant workers in southern China. She also observed the 'counterintuitive' phenomenon that many of the lesbian workers stoutly refuse to marry (although not necessarily coming out to their parents) and live a relatively economically independent life in metropolises.

ally intelligible way to express commitment publicly. Commitment ceremonies, as Hull points out, can enact legalities through customs, and in these scenarios, ‘culture is made to do the work that law would otherwise do’.<sup>46</sup> While same-sex weddings can be criticized as imitating heterosexual ones,<sup>47</sup> there can also be some twists that expose and challenge the heteronormativity of marriage.

For instance, during the wedding of the above-mentioned feminist lesbian activists Maizi and Lu, as opposed to the cliché-type lines, the host announced jokingly, ‘marriage is a fart, so please don’t take it too seriously!’ Some journalists asked, ‘is it another performance art or is it a real marriage?’ They smiled, and did not give an answer.<sup>48</sup> In another wedding between a lesbian activist couple Taozi and Yingzi<sup>49</sup>, they decided not to vow the ‘big lie’ of loving each other forever. Instead, they promised to stay together as long as they are still in love, and they believed the promise to ‘change the world together’ much more romantic.<sup>50</sup> These words would sound rather improper in a ‘normal’ Chinese wedding, which made their ceremonies refreshing.

In addition to having a wedding, same-sex partners also make meaning for their relationship while doing other legal activities that have a quasi-ritual nature. For instance, said Yushi<sup>51</sup>, a lesbian who had been with her partner for more than ten years,

‘In 2007, we bought a house together, not very big, about 50 m<sup>2</sup>. We finally had our own home. I still remember, when we went through the formalities at the real estate transaction center, we were sitting next to each other, surrounded by a few governmental officials who were instructing us to sign our names and put our fingerprints here and there...

At a certain moment, I strongly felt that the whole process was like we were registering a marriage, with so many solemn and dazzling papers and procedures. When we got our property registration certificate, we looked at our names on it again and again, as excited as having obtained a marriage certificate.’

For Yushi and her partner, the administrative law on real-estate registration and their interaction with the officials had some unintended effects of confirming, strengthening, and legitimizing their relationship, in addition to legalizing their property co-ownership. The property law and the trans-

46 Kathleen E Hull, *Same-Sex Marriage: The Cultural Politics of Love and Law* (Cambridge University Press, 2006) 24.

47 As Warner argues, while ‘coming out publicly exposes you as a being defined by desire’, marriage ceremony ‘embraces propriety, promising not to say too much’, thus being safer and less radical than coming out. See Michael Warner, *The Trouble with Normal: Sex, Politics and the Ethics of Queer Life* (Free Press, New York, 1999) 133.

48 Excerpt from Tingting Wei, ‘The Same-Sex Wedding I Hosted’ (八一八我主持的女同性恋婚礼), *Queer Lala Times*, 27 July 2015, at [www.webcitation.org/6qWUXFSfw](http://www.webcitation.org/6qWUXFSfw).

49 As they are lesbian activists, I use their pseudonyms as known in the community.

50 See Yingzi’s Weibo post, at [www.webcitation.org/6ecrWMu0c](http://www.webcitation.org/6ecrWMu0c).

51 Yushi is the pseudonym of an activist whom I do not further anonymize.

action center thus can be said to have 'functional equivalence'<sup>52</sup> to marriage law and the civil affairs bureau in this particular scenario. In return, their personal feelings of solemnity and happiness throughout this procedure have also given meanings to the seemingly emotionless laws on property transaction. The legal aspect of marriage or other forms of commitment is shown to be inseparable with the emotional and the economic.

While Yushi and her partner partially legalized their relationship via co-ownership of an apartment, J, a rich gay man, has a pessimistic attitude towards practices like this. He has not made any serious legal arrangements with his partner, whom he had cohabited with for six years, either on property ownership and inheritance, or on surrogate medical decision-making, even though he himself is a lawyer and knows how to secure some of these rights without getting married. For J, coming out is the prerequisite to such quasi-marriage arrangements:

'Neither of us has come out to our families. We doubt if these legal papers can help much. Imagine I died and suddenly a 'stranger' came and argued against my parents that I had left most of my inheritance to him. How could my parents believe and happily accept that! It will only cause them more pain, which is not what I wanted. Similarly, my parents would not let a 'stranger' make medical decisions for me if I were in coma, even if he had the power of attorney. That's why it's luxurious to talk about same-sex partners' rights before you come out to your family.'

His worries are not unfounded. As many cases after the September 11 attack have indicated in the United States, in the jurisdictions that still had an anti-sodomy law or did not recognize same-sex partnership, the homophobic closet may complicate the relationship between a surviving same-sex partner and the family members of the deceased, the latter of whom may want to dispossess the former.<sup>53</sup> Although the misfortunes of the same-sex surviving partners in the US are not very well known in China, for a closeted Chinese gay man like J, coming out and confronting the partner's family can invoke similarly uneasy feelings.

The closet also makes younger same-sex-oriented people rely less on their parents economically, unlike their peers. While it is a common practice that the parents generously subsidize a different-sex couple, who are newly married or going to marry, to buy a conjugal house, the closeted same-sex couples can hardly have such support. They either have to live with their

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52 The idea of functional equivalence in comparative law suggests that different laws and institutions may perform the same role or solve the same problem. See K Zweigert, 'Methodological Problems in Comparative Law' (1972) 7 *Israel Law Review* 465-474; Kees Waaldijk, 'The Right to Relate: A Lecture on the Importance of "Orientation" in Comparative Sexual Orientation Law' (2013) 24 *Duke Journal of Comparative and International Law* 1, 161-199.

53 Nancy J Knauer, 'September 11 Attacks and Surviving Same-Sex Partners: Defining Family Through Tragedy' (2002) 75 *Temple Law Review* 32-98, 44.

own parents as a single adult child, thus having less privacy and financial freedom, or to rent an apartment together without letting their parents know.

In fact, not everyone has the need to make legal arrangements on valuable properties, because, as many respondents expressed, property ownership is a concern of the haves. The idea of settling down with a beloved same-sex partner with proper legal arrangements is even more unreachable for rural-to-urban migrant workers I met in the gay-cruising area of a park in Guangzhou. Many of them live in a suburb of Guangzhou where the rent for a small room can be three times cheaper than in the center. They can hardly afford a decent apartment in this metropolis. Some of them work as waiters in restaurants, unregistered peddlers at night, or street sex workers. The instability in their housing and jobs deeply intersects with their precarious same-sex relationship. Most of them would rather 'live in the moment' than making any long-term financial or relationship plans, which may not be because they do not want to commit, but the very wish and ability to plan for domestic life is a financial issue as well. The limited space in this thesis unfortunately does not allow me to describe in detail about their intimate and social life, but my encounters with them always reminds me to be alerted to the socio-economic factors that influence one's life trajectory and legal consciousness.

Moreover, establishing a family by signing a series of contracts does not only require money but also access to legal professionals.<sup>54</sup> The abstruse legal language can be deterring, and so is coming out to an unacquainted lawyer. Therefore, when I asked my respondents whether they have any financial agreement or whether they plan to make one, the most frequently heard answer is, 'we didn't think much about it', 'it is basically a trust issue', or 'if we had very different views on money, we wouldn't have gone so far, right?' We should not see their answers as merely being too ignorant or reckless about the legal consequences of cohabitation, especially the potential disputes out of it. Large numbers of heterosexual unmarried couples would not bother learning about and planning with the law, either. After all, law would often stay dormant unless things go wrong. The difference is, however, that a straight couple can follow the relationship escalator that finally extends to marriage with a default package of rights, obligations and dispute settlement mechanisms, while their same-sex counterparts do not have such an end. Therefore, when disputes do happen, the ambiguous rules can cause many troubles, and mere 'trust' is far from sufficient.

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54 Nancy J Knauer, 'Domestic Partnership and Same-Sex Relationships: A Marketplace Innovation and a Less Than Perfect Institutional Choice' (1998) 7 *Temple Political and Civil Rights Law Review* 337; Ryan Nishimoto, 'Marriage Makes Cents: How Law and Economics Justifies Same-Sex Marriage' (2003) 23 *Boston College Third World Law Journal* 2, 379-398, 389.

### 3.2.3 Property Disputes Between Same-Sex Couples

When same-sex partners have disputes, Chinese courts are facing a conundrum: should this relationship be dealt with as a quasi-business or quasi-marriage ones? Either way, it is difficult to make legally consistent reasoning according to the existing laws that assume a market/marriage binary and that have little recognition of intimate relationships beyond heteronormative marriage.

In one court case, for instance, the plaintiff Gao claimed that she and the defendant Han were a female same-sex couple who had cohabited for six years.<sup>55</sup> In 2006, Gao and Han decided to buy an apartment in Guangdong Province by installments, and Gao paid the down-payment and the installments for 71 months. They put both their names on the property ownership certificate, and agreed to share the property rights by half. After they split up, Gao sued and claimed that Han, as a co-owner, should reimburse her half of the down-payment, as well as half of the past and future installments. The trial court held that their same-sex partnership had implied the tacit willingness of Gao to pay the down-payment all by herself, and claiming it back after the breakup contravened the principle of good faith (*chengxin*).

However, the appeals court overturned the lower court's decision.<sup>56</sup> It drew a clear line between spouses and business partners – as long as the couple's relationship fell outside the domain of 'marriage', the court would only deal with property disputes according to property law and contract law, without considering their private life. Discrimination thus lies in placing 'fictitious legal distinctions before the reality of family life'<sup>57</sup>: if 1) Gao and Han were a married different-sex couple, 2) the conjugal house was bought by Gao *after* marriage under her name alone, and 3) the two did not have an agreement on individual property, then the default rule would be that Han is still the co-owner of this communal property (or can get the equivalent price of her share), and she would not have to reimburse Gao

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55 *Gao Yuling v. Han Fengqin*, Judgment of the Second Instance, Shenzhen Intermediate Court, (2013), No. 2588 (高玉玲与韩凤芹按份共有纠纷二审民事判决书, 广东省深圳市中级人民法院 (2013) 深中法房终字第2588号). The information of the judgment of the first instance cannot be found online, but the main arguments and decisions of it are incorporated in the second-instance judgment.

56 *Ibid.*

57 These words are originally from the judgment in a case concerning a cohabiting couple in the United States, *Braschi v. Stahl Associates*, 543 N.E.2d 53, New York Court of Appeals, United States (1989).

the already occurred mortgage in order to secure her co-ownership.<sup>58</sup> A marriage certificate should suffice, and Han would not have to provide any substantial proof of beyond-friend relationship, long-term cohabitation or Gao's explicit expression of gift-giving. However, since they are a same-sex couple, no default rule of co-ownership would apply, no matter how long they have been living together. As they cannot get married, there is no dividing line between prenuptial or post-marital property – their relationship is perpetually 'prenuptial'.

In a similar case, the defendant Chen argued the down-payment willingly undertaken by the plaintiff Tu was a gift as an expression of love. The court reasoned:

'... the defendant did not provide sufficient evidence that they were same-sex lovers and that the down-payment was a gift. Moreover, since the plaintiff is an ordinary working-class person, it is obviously against common sense that she would give a large amount of money to the defendant gratuitously.'<sup>59</sup>

Here same-sex relationship seemed unthinkable for the court, and the very act of adding another person's name onto the property registry for free does not suffice to prove the intent of gift-giving.<sup>60</sup> Influenced by the heteronormative 'common sense', the judges could not picture a working-class woman willingly buy an apartment to accommodate a person of the same sex, a non-kin, for free. In contrast, they may find it completely 'normal' when a working-class married man generously devotes almost all his savings to buy a house *after* marriage, a house that automatically turns into communal property unless agreed otherwise. In this sense, a marriage certificate is functionally equivalent to a written gift-giving contract, whereas same-sex couples do not have this convenient paper to prove their willingness to share. Consequently, the economically weaker party in a same-sex relationship may be disadvantaged when separating, as they have to reimburse the richer party the downpayment and installment, while their domestic labor is often unpaid and unappreciated by law.

58 According to Article 17 of Marriage Law, the property bought *after* marriage would be deemed as communal property, no matter who is/are the owner on the registry. If one of the couple pay the downpayment *before* marriage, and registered as the owner, while the two paid the installment together during marriage, then the court could decide the one whose name is on the registry owns the property, and the other should be reimbursed. See Article 10 of the 2011 Interpretation. The 2011 Interpretation does not change the rule on co-ownership of property brought *after* marriage.

59 *Tu v. Chen*, Songjiang Trial Court, Shanghai, 2012, No. 2163 (屠某诉陈某所有权确认纠纷民事判决书, 上海市松江区人民法院 (2012) 松民一初字第2163号).

60 Indeed, the law requires a written gift contract when the owner of a real estate wants to give all or part of the ownership to others. See Urban Real Estate Administration Law of the People's Republic of China (中华人民共和国城市房地产管理法), adopted 30 August 2007, effective 27 August 2009, Articles 37 and 41.

For unmarried different-sex couples, there is no default rule on common property, either. Chinese law has stopped recognizing *de facto* marriage since 1994. Before the promulgation and implementation of the Regulation on Marriage Registration on 1 February 1994, *de facto* marriage was endowed the same status as *de jure* marriage, as long as the couple meet the substantial criteria of marriage and publicly present as spouses. After 1 February 1994, however, the unregistered cohabiting couples are no longer deemed as married spouses, unless they had met the substantial criteria before that day.<sup>61</sup> It seems that current Chinese Marriage Law is resonating from afar with the Napoleonic adage, i.e., ‘cohabitants ignore the law and so the law ignores them’.<sup>62</sup> In this sense, marriage law discriminates on the ground of formal marital status, regardless of sexual orientation. Meanwhile, however, discrimination on the ground of sexual orientation also exists, in that a different-sex cohabiting couple is entitled to get married so that they can no longer be ignored by law, whereas same-sex couples are perpetually ‘unmarried’ and unnoticeable.

Moreover, even if a different-sex married couple agreed beforehand to have separate ownership of property during marriage, the law still tries to make equitable distribution of property in divorce. Article 40 reads, ‘the one who performs more duties in rearing their children, looking after their elders and assisting the other party in work shall have the right at the time of divorce to request reasonable compensation from the other party’.<sup>63</sup> However, same-sex couples are not entitled to such ‘reimbursement alimony’,<sup>64</sup> even if they have had a shared life, a concerted effort to establish a family, as well as enormous investment of time and affection to that end. Unlike marriage, the lack of legal constraint makes it easier for one partner to freely walk out of a same-sex relationship. While this gives same-sex-oriented people more financial and sexual freedom that different-sex spouses may envy, it nevertheless excludes same-sex couples from the sweet burdens of the ‘legally enforceable commitment’ some do desire.<sup>65</sup>

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61 For the vicissitude of the legal status of different-sex cohabitation in China, see Palmer, ‘The Re-emergence of Family Law in Post-Mao China’ (1995) 110.

62 Brienna Perelli-Harris and Nora Sánchez Gassen, ‘How Similar Are Cohabitation and Marriage? Legal Approaches to Cohabitation across Western Europe’ (2012) 38 *Population and Development Review* 3, 435-467, 460.

63 Marriage Law, Article 40.

64 Reimbursement alimony is not a legal term in the Chinese Marriage Law. I borrow this term from the case law in the United States, where the courts reimbursed the efforts and expenses incurred by a spouse during the marriage for an equitable result, for instance, where the wife supports the husband during school while he receives a degree. See *Postema v. Postema* 471 N.W.2d 912. Michigan Court of Appeals, United States (1991).

65 It is argued that the most prominent meaning of marriage is not the right to opt in, but the constraints on freely opting out. Therefore, marriage is a legally enforceable commitment. William M Hohengarten, ‘Same-Sex Marriage and the Right of Privacy’ (1994) 103 *The Yale Law Journal* 1495-1531, 1501.

For instance, in 2008, some media reported a case where a lesbian couple separated after three years' cohabitation, and the plaintiff sued and requested the defendant to repay her a 'care-taking fee' of 20,500 RMB, i.e., 500 RMB per month for the previous years. The defendant was blind and hard-of-hearing. She divorced her husband one year after she met the plaintiff, and wrote a 'commitment letter', promising to love her forever. The plaintiff complained that she cooked and did the washing for the defendant all the time, but now the defendant wanted to go back to her ex-husband. Therefore, the plaintiff hoped to claim back the value of her housework, and argued, '500 RMB per month was already very low compared to the market price for a cleaning lady'.<sup>66</sup>

The judges found it a difficult case, since they could not put it in any existing category of disputes. The case was eventually classified as 'other disputes', instead of a family, business partnership or employment one. A lawyer not involved in this case commented:

'Same-sex partnership is not a marital relationship, so the rules on communal property do not apply to this couple. However, the plaintiff's behaviors fall into the doctrine of *negotiorum gestio* (voluntary agency) under civil law, since she does not have any legal obligation to take care of the defendant in the first place. She is thus entitled to claim back the money of the services she had provided.'<sup>67</sup>

No media followed the case up. I wrote to the court to ask about the result of it, and the court replied that the plaintiff withdrew the suit because they two had come to an agreement by mediation outside the court, the terms of which were unknown.

In the above two cases concerning same-sex separation, both the plaintiffs and the defendants tried to look for arguments from a wider scope of civil law, including co-ownership contract, gift contract and *negotiorum gestio*. None of them have problematized the arbitrary dividing line between different-sex marriage and other intimate relationships, probably because challenging the existing marriage law is less feasible and desirable than appropriating other laws to win the case at hand. However, by borrowing the rules and principles of contract law into same-sex separation disputes, they brought to light the false dualism between family and contract, as well as the dilemma this binary causes to those relationships that fall outside of the neat categories.<sup>68</sup>

66 'A Homosexual in Hangzhou Sued Her "Lover" for Alimony' (杭州一同性恋者状告"恋人"违约求抚养费), *Danlan*, 22 January 2008, at [www.webcitation.org/6mY5zAoSV](http://www.webcitation.org/6mY5zAoSV).

67 Shisong Ding, 'A Tongxinglian Sues Her Separating Partner for 20,000 RMB (同性恋分手诉至法院索赔2万)', *Sina*, 23 January 2008, at [www.webcitation.org/6mY6ESk5E](http://www.webcitation.org/6mY6ESk5E).

68 See Section 1.2. See also, Janet E Halley and Kerry Rittich, 'Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism' (2010) 58 *American Journal of Comparative Law* 753-776 757.

A subtle detail is worth noticing. It is stipulated that, in order to protect the parties' privacy, the name or title of the parties shall be anonymized in the judgments of cases concerning marriage, family, and inheritance.<sup>69</sup> However, as *Gao v. Han* was categorized as co-ownership disputes by both the trial court and the court of appeal, it is not one of the scenarios where anonymity is mandatory. This freely accessible judgment spells out their full names and depicts their same-sex relationship and disputes, which is essentially disclosing their sexuality to the public beyond their will. In other words, the court infringed upon their privacy in a completely lawful way. Such negligence again reflects the hidden assumption of family as 'private' and contract as 'public',<sup>70</sup> and sees same-sex relationships as non-families that does not deserve privacy protection. This seemingly minor issue could possibly have disastrous consequences on closeted same-sex-oriented people in an unfriendly social environment. The legal rules on the open access and anonymity of judgments is also an example of Family Law 3 that seems irrelevant to the narrow scope of family law but shares the logic of it and in return silently reinforces the supremacy of heteronormative family.<sup>71</sup>

### 3.3 SAME-SEX-ORIENTED PEOPLE IN MARRIAGES

Not all same-sex-oriented people are willing to or can afford to live without the marriage jacket. Although those who get married seem to conform to the marriage imperative, many of them also manage to negotiate between same-sex sexual/romantic desire and the desire for a stable, decent family. They vividly illustrate how to get some fresh air in such a tight straight-jacket. Of course, such magic tricks can fail, and even successful ones can come with unbearable costs. Before going into the stories of married same-sex-oriented people, I will contextualize two forms of different-sex marriage that are prevalent in contemporary China, namely, mixed-orientation marriage and cooperative 'nominal' marriage (*xinghun*).

Western literature on mixed-orientation marriage often contains widely different situations: some people only developed their same-sex attraction after marrying a heterosexual person of the different sex; some are in hesitation, hoping a 'normal' marriage can curb their same-sex desire; some are

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69 See Article 6 (1), Provisions of the Supreme People's Court on the Issuance of Judgments on the Internet by the People's Courts, adopted 13 November 2013, effective 1 January 2014. The decision of the appeals court of *Gao v. Han* is put online on 1 July 2014.

70 Ibid.

71 However, I acknowledge that there can be random factors than the non-recognition of same-sex intimate relationships that influence the anonymization in judgments. The case in footnote 59 does anonymize the same-sex couple in dispute, while several divorce cases between different-sex spouses can be found online with the full real names of both parties. In these situations, the clerks' privacy awareness or recklessness may play an important role, too.

bi- or pansexual; some are religious, who value marriage over their 'sinful' sexuality; some keep their orientation in secret and some have already 'confessed' to their straight partners before getting married.<sup>72</sup> However, in contemporary China, the complexity of mixed-orientation marriage is often narrowed down to the pejorative concept of 'marriage fraud' (*pianhun*). Marriage fraud in this context refers to a closeted same-sex-oriented person seeking to pass as heterosexual by marrying a non-complicit person of the different sex. The unwitting spouse is called *tongqi* (literally, 'a gay man's wife') or a *tongfu* ('a lesbian's husband').<sup>73</sup>

'Marriage fraud' is a highly gendered phenomenon – while media have increasingly covered *tongqis'* stories, there is little discussion of *tongfus*.<sup>74</sup> With the ever-increasing gay visibility, women have started to question whether their indifferent or feminine husbands might be 'gay'. After some wives came forward publicly with tragic stories of their 'fraudulent' marriages, more and more self-identified *tongqis* have grouped together online and offline to condemn 'gay liars'. One study concludes that around 13.6 million 'gay men' (*nan tong*) in China have entered into different-sex marriages.<sup>75</sup> Media reports, often citing this eye-catching statistic, strongly sympathize with *tongqis*, especially with their lack of sexual satisfaction in marriage, as evidenced by eye-catching headlines like 'My Husband Never Saw Me Naked'<sup>76</sup> or 'Still a Virgin in Her 60s'<sup>77</sup>. The women's unfortunate predicament has provoked considerable public anger, while articles purporting to explain how to tell if a boyfriend or husband is gay have gone viral.

72 See e.g., Barbara Couden Hernandez, Naomi J Schwenke and Colwick M Wilson, 'Spouses in Mixed-Orientation Marriage: A 20-Year Review of Empirical Studies.' (2011) 37 *Journal of Marital and Family Therapy* 3, 307-318; Lisa B Schwartz, 'Mixed-Orientation Marriages: Coming Out, Staying Together' (2012) 8 *Journal of GLBT Family Studies* 1, 121-136; Michelle Wolkowicz, 'Wrestling with the Angels of Meaning: The Revisionist Ideological Work of Gay and Ex-Gay Christian Men' (2001) 24 *Symbolic Interaction* 4, 407-424.

73 For legal background, e.g., Chinese Marriage Law's neglect of same-sex extra-marital relationships, see Section 2.2.5.

74 My research thus mainly focuses on *tongqis* and their same-sex-oriented husbands, while also touching upon married same-sex-oriented women and *tongfus*. For more discussion on the gender disparity, see Section 3.2.2.

75 Minghua Liu and others, 'Estimation on the Numbers of Chinese Homosexuality and People with Same-Sex Sexual Behaviors and Related Female Group' (2013) (中国同性恋者、同性性行为者和相关女性群体人口数值估测) 53 *Journal of Chemical Information and Modeling* 117-121, 120. However, this number arbitrarily labels all married 'gay' men without differentiating if they themselves identify as such, if they developed their same-sex desires after getting married, if they had informed their wives about their orientation, or if the marriage is cooperative in nature.

76 Yan Lu, 'Chinese *Tongqi*: My Husband Never Saw Me Naked', *SINOCA*, 11 April 2014, at [www.webcitation.org/60c9q167I](http://www.webcitation.org/60c9q167I).

77 Juan Fang, '600 Thousands *Tongqis* among Tens of Millions Are Still Virgins', *Souhu Women*, 15 February 2012, at [www.webcitation.org/60cA4a1iO](http://www.webcitation.org/60cA4a1iO).

While 'fraudulent' marriage is heavily scolded, the openly negotiated 'nominal' marriage, or cooperative marriage, between a lesbian and a gay man with or without legal marriage certificate is often valorized as a more ethical solution, because it seems to pose no harm to an innocent straight person. In some existing lesbian-and-gay-studies literature, scholars tend to speak highly of this strategy, seeing it as a 'silent force of resistance'<sup>78</sup>, a 'new intimate alliance'<sup>79</sup> or a 'queer kinship practice'<sup>80</sup> that tacitly subverts the hetero-patriarchal institution of marriage. Mainstream media seem to cover cooperative marriages less frequently than mixed-orientation marriages, and often in a more concurring tone.<sup>81</sup> Indeed, it provides a practical alternative for those same-sex-oriented people who do not dare to come out to their parents but cannot afford to straightforwardly defy the marriage imperative.

However, for the opponents of cooperative marriages within LGBT communities, this coping strategy is still bowing to or even complicit with heteronormativity, since most cooperatively married couples would keep closeted in front of their families, colleagues and acquaintances.<sup>82</sup> Instead of hiding oneself in marriage, some argue, coming out is the most authentic and burden-free lifestyle.<sup>83</sup> According to the popular gay-rights slogans of 'being your true self' and 'becoming powerful inside',<sup>84</sup> a different-sex marriage, whether cooperative or mixed-orientation, is deemed substantially incompatible with a true same-sex-desiring self.<sup>85</sup>

During my research, I took all the above practices and opinions into account. Although all of them are so rich to explore from various perspectives, the following subsections mainly focus on the interaction between Family Law and my same-sex-oriented respondents in mixed-orientation and cooperative marriages, or how the socio-legal rules leave marks on their marital life and are simultaneously changed by them. The issues of true/fake, honesty/fraud and resistance/complicity behind the implied moral

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78 Yip Lo Lucetta Kam, *Shanghai Lalas: Female Tongzhi Communities and Politics in Urban China* (Hong Kong University Press, Hong Kong, 2013) 100.

79 Yingyi Wang, 'Cooperative Marriage: A "Fake Marriage" or a New Intimate Alliance?' (Degree Thesis of Master of Philosophy, The University of Hong Kong, 2015).

80 Engebretsen, *Queer Women in Urban China* (2014) 59.

81 See e.g. Zi Heng Lim, 'For Gay Chinese, Getting Married Means Getting Creative', *Atlantic*, 11 April 2013, at [www.webcitation.org/6f4P3a4pS](http://www.webcitation.org/6f4P3a4pS).

82 See e.g., Steven Paul Bielinski, 'The Market of Cooperative Marriage as Sugar-Coating Toxin', *Danlan*, 11 February 2015, at [www.webcitation.org/6mYSGtVv2](http://www.webcitation.org/6mYSGtVv2).

83 Ibid.

84 In my fieldwork, the rhetoric of inner strength (*neixin qianga*) is most frequently heard in PFLAG story-sharing meetings, which is used by both openly gay children and their supportive parents. They persuade the closeted same-sex-oriented people and the unaccepting parents to be more courageous and to worry less about others' judgments. Such emphasis on the individuals' responsibility to be mentally strong tends to underrate the cultural and economic constraints that make people less 'brave' in resisting the institution of marriage.

85 See e.g., some gay activists' attitudes, in Wang, 'Cooperative Marriage' (2015) 101-103.

hierarchy between coming out, cooperative marriage and mixed-orientation marriage will be revisited in the end of this chapter as well as in Chapter 7.

### 3.3.1 Tailoring Marriage via Cooperation

Cooperatively married same-sex-oriented people often see more clearly the contractual, pragmatic aspects of marriage than those who get married starting from heterosexual courtship and romantic love. Oftentimes, the most helpful legal advice given to cooperative-marriage seekers is not from lawyers, but from those who have real-life experiences. The organizer of a cooperative-marriage match-making online group, Xiong<sup>86</sup>, who is cooperatively married herself, showed me the sample prenup she drafted. She kept emphasizing that people all walked in different shoes, so this sample should always be tailored to specific situations.

#### Prenuptial Agreement

Party A: \_\_\_ (female)

Party B: \_\_\_ (Male)

Whereas both parties are facing the pressure to marry, it is agreed, upon friendly negotiation, as follows:

1. Both parties intend to enter into an asexual, cooperative marriage. The specific details such as the time, location and the procedures of the marriage shall be further negotiated between the two.
2. If either party has intended to end the contract and get divorced after the marriage, he or she shall, for the interests of both parties, let the other know before getting married.
3. During the cooperative marriage, Party B shall not have flirtatious (*aimei*) relationship with any other women than Party A that will affect the superficial happiness (*biaomian xingfu*) of the marriage, and vice versa.
4. All property that belongs respectively to each of the parties before and during marriage shall be and shall perpetually remain their personal estate. Neither party shall interfere with the other's financial decisions. One party shall not be responsible for any debts incurred by the other. If either party were to conclude a contract with a third party (including a debt agreement), he or she shall inform the other party in a timely matter.
5. Both parties agree to waive the right to inherit from each other.
6. The decision to bear or adopt a child shall be made together. Both parties have the obligation to raise the child. Should one party decide to bear or adopt a child without the consent of the other, he or she shall assume full responsibility for raising the child.
7. During marriage, one party shall, under the principles of equality and free will, provide reasonable help to maintain the spousal relationship, for instance, visiting the other's parents and participating in the other's family events. Unless agreed otherwise, neither party is obliged to support the other's parents.
8. Both parties are obliged to update each other the whereabouts and recent status and answer each other's questions honestly.
9. Both parties shall respect each other's private life and keep it strictly in secret.

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86 This is the nick name as she is called in the community.

From this sample, we can see some distinctive characteristics of a prototypical cooperative marriage: it is not premised on conjugal sex; it respects the privacy and boundaries of both spouses; it emphasizes negotiation and mutual help; it involves as little monetary entanglement as possible; the spouses know well that marriage as a doing rather than being, so the appearance of it in daily life is as important as the certificate, such as avoiding being too close with other different-sex colleagues or friends and visiting parents regularly.

Although lawyers and cooperative-marriage group organizers always encourage same-sex-oriented people to spell out the terms and conditions as clearly as possible, many of those who decided to marry cooperatively nevertheless are reluctant to do the paper works. The major reasons I heard are common to those given by those heterosexual couples who do not have a prenup: 'mutual trust works better than contract'; 'I believe she/he is a reliable person; otherwise I wouldn't marry him/her'; 'it's awkward to talk about money between friends'; or 'why bother? I do not have a big house to lose'. A special (but mistaken) reason for some cooperative-marriage couples is that 'we will only have a counterfeit marriage certificate and a "fake" wedding to make our parents happy. The marriage is not legally valid anyway, so it's unnecessary to have a prenup'.<sup>87</sup>

Jasmine, a lesbian who got legally married to a wealthy gay man, told me that she felt fine not to sign a contract beforehand, because she never thought of taking advantage of other people. What she wanted was simply a 'fig leaf' that covered her secret relationship with her female partner. Her gay husband was more cautious, however, because he had several real estates and his income was much higher than hers. They then asked a lawyer to draft a prenuptial agreement. They did not come out as lesbian and gay, since that lawyer was used to seeing engaged couples coming up with all sorts of arrangements with regard to property, housework, child and sex life – there seemed no need to highlight their sexual orientation in this scenario. This again suggests the likeness of a cooperative marriage and an 'ordinary' one.

What does the court say about the legality of such a prenuptial contract? So far there is only one case in the official database where the parties explicitly used the term 'shell and reciprocal marriage (*xingshi huzhu hunyin*)', although from the judgment we cannot tell the disputing parties' sexual orientation.<sup>88</sup> In the prenup, the parties agreed to be asexual and should have separate properties and debts, similar to Xiong's sample. In addition, they agreed,

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87 For the non-recognition of *de facto* marriage in China, see footnote 61 and accompanying text.

88 *Yu v Lu*, Yuecheng Trials Court, Shaoxing, Zhejiang, 2014, No. 2177 (余某与陆某离婚纠纷一案民事判决书, 浙江省绍兴市越城区人民法院 (2014) 绍越民初字第2177号).

'...During marriage, both parties should have their own private lives, and should not interfere with each other's choice of dating or cohabiting with a third person. The extra-marital relationship shall not be invoked as a reason for a divorce lawsuit...

... In case either party had an accident, the other may provide help in good faith, but he or she is free from compulsory caretaking.'<sup>89</sup>

The court examined the validity of the prenuptial agreement. It recognized that the agreement was concluded out of complete willingness of both parties, so it was valid in general, including the terms and conditions on property ownership. An asexual marriage was not against the law's prohibitive rules, so it is valid, too. However, reasoned the court, the clauses on extra-marital relationship and on the waiver of caretaking obligation are invalid, because they breached the principles of conjugal chastity and mutual respect,<sup>90</sup> as well as the statutory duty to maintain each other.<sup>91</sup> It is reasonable to infer that the sample contract is likewise partially invalid, considering its renouncement of caretaking towards the spouses, their respective children and parents.

The court's decision on the invalidity of the openness of this marriage is unsurprising, because the existing marriage law is based on and speaking for monogamy. In this sense, the cooperative marriage between same-sex-oriented man and woman is a practice of consensual non-monogamy, as the spouses aim for a non-exclusive relationship from the very beginning. The openness is posing a challenge of the socio-legal norms on chastity and fidelity in marriage, although there can still be jealousy of one's same-sex partner towards his or her legal spouse,<sup>92</sup> and although such challenge has been and will probably continue to be discouraged and delegitimized by courts.

Despite its symbolically subversive potentials, having a cooperative marriage with real marriage certificate means that both parties have to bow to the legal rules sometimes, which reminds us of the restraining effects of the straightjacket. One legal restraint is that marriage results in common debts by default. Even if the spouses have agreed beforehand to separate their respective properties and debts during marriage, a *bona fide* third party, namely a creditor in good faith who does not know about the prenup, can still make legal claims against either spouse.<sup>93</sup> The burden to prove that the third party did know their preputial agreement on separate debt then falls on the spouse who denies the common debt.

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89 Ibid.

90 Marriage Law, Article 4.

91 Marriage Law, Article 20.

92 Yaya Chen, 'Challenges on Traditional Marriage by the Marriages and Families of Lesbians (女同性恋者的婚姻和家庭给传统婚姻制度带来的挑战)' (2009) 29 *Society* 1-23; Wang, 'Cooperative Marriage' (2015).

93 Contract Law, Article 51; Marriage Law, Article 19.

Moreover, once a cooperative marriage is formally registered, the restrictive rules on divorce will apply. Especially, the husband cannot easily opt out during his wife's pregnancy, within one year after the birth of their child, or within six months after an abortion or a miscarriage, unless the wife applies for a divorce or the court deems it necessary to accept the divorce application made by the husband.<sup>94</sup> As a court case shows, the claim that the marriage is a 'fake' one does not affect the realness of marriage registration and the soundness of parenthood.<sup>95</sup> There is also restriction on divorce if one party of the cooperative spouses is a soldier: if the spouse of a soldier in active military service desires a divorce, the soldier's consent must be obtained, except when the soldier commits a serious fault.<sup>96</sup>

Even a well negotiated and minimally involved cooperative marriage can end up with unexpected responsibilities. In a podcast program called 'LesTalk', an experienced activist from Taiwan, Wang Ping, shared a story she heard about a cooperative marriage in mainland China. A lesbian and gay man had agreed to divorce soon after they got the marriage certificate. However, just before the day of the planned divorce, the man had a car accident and became paralyzed. Out of legal obligation and moral pressure, the lesbian has to take care of him and provide for his parents for much more years than she would like to. Wang thus warned the listeners that they should always be prepared for the unpredictable and envisage the worse-case scenario if they were to marry cooperatively.<sup>97</sup>

The obligations as a married person are in particular suffocating for same-sex-oriented women in China, because, as some feminists warn, 'a cooperative marriage is, after all, a marriage'.<sup>98</sup> For them, entering into the legal institution of marriage also means a loss of protection against unwanted sex conducted by their lawful husbands, especially when these men are pressured to carry on their family line. Anecdotes often say that some gay men breached the prior agreement not to have kids and raped their lesbian wives.<sup>99</sup> These stories, whether authentic or not, do reveal genuinely-felt fears and anxieties. Chinese law does not make clear the

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94 Marriage Law, Article 34.

95 According to a piece of news, within a year after the birth of their child, the cooperatively married couple had some disputes and the gay man applied for divorce, but the court rejected his request according to Article 34 of the Marriage Law. The text of the judgment cannot be found online, but the news is available at [www.webcitation.org/6eeH2pF2k](http://www.webcitation.org/6eeH2pF2k).

96 Marriage Law, Article 33.

97 LesTalk Podcast, 'Tongzhi Rights Movements from the Perspective of the Third Interpretation of Marriage Law', *Lizhi FM*, 15 February 2012, Issue 103, at [www.webcitation.org/6qWVUG3xP](http://www.webcitation.org/6qWVUG3xP).

98 'Group Discussion: How Revolutionary is Cooperative Marriage?' (形婚的革命性在哪里?) *Queer Lala Times*, 22 June 2014, at [www.webcitation.org/6eeKvS1T7](http://www.webcitation.org/6eeKvS1T7).

99 See e.g., 'In order to have children, gay man raped his lesbian wife for more than 30 times' (为了得到孩子,基佬强暴形婚拉拉不下30次), *Feminist Bar*, 21 June 2014, at [www.webcitation.org/6lWOnRFMb](http://www.webcitation.org/6lWOnRFMb). Although the authenticity of the story is questionable, the fear of lesbians is embodied and worth addressing.

liabilities of marital rape,<sup>100</sup> and the recently promulgated Law Against Domestic Violence does not include sexual violence within a family.<sup>101</sup> Therefore, the lack of protection in Chinese law against sexual violence between spouses can be one of the factors that make lesbians, and women in general, feel not secure enough in marriage.

The tightness of the straightjacket is also felt in everyday life, where same-sex-oriented people are pressured by the social expectations of what a 'normal marriage' should look like. Previous research has shown that gender stereotypes can be easily found in the marriage-seeking ads of same-sex-oriented people,<sup>102</sup> which is also true for most of my respondents during marriage. The cooperatively married couple are expected to live together, display affection to each other in public, and be respectful and obedient towards the other's parents. Although heterosexuals are also 'performing'<sup>103</sup> to be loving according to the gender scripts, the performance of a lesbian and a gay man may look dubious sometimes. Bao, a cooperatively married lesbian, said,

'Every time our parents visit our "conjugal house", in which I actually do not live most of the time, I have to hastily bring my pajama, toothbrush and cosmetics there. But I was so unfamiliar with my husband's kitchen that we almost "spill the beans" (*louxian*), because I couldn't find a tea cup for my mother-in-law.'

The mundane aspects of their marital life, including the placement of things like pajama and tea cups, are not irrelevant information for a legal pluralist.<sup>104</sup> In different languages, marriage law and these items are all telling Bao how a married couple should sleep (i.e., on the same bed) and how a good wife should behave (i.e., serving tea for a visiting parent-in-law). The

100 The crime of rape is stipulated in Article 236 of the Criminal law. Rape within marriage is not criminalized as a separate crime, and an oft-discussed case in law-school textbooks is the one that happens after a divorce lawsuit and before a divorce judgment takes effect. In this case, the husband was found guilty, while there are no statistics about other marital rape cases. See Harold Tanner, 'Chinese Rape Law in Comparative Perspective' (1994) 31 *The Australian Journal of Chinese Affairs* 1-23.

101 Chinese Law Against Domestic Violence, adopted 27 December 2015, effective 1 March 2016.

102 Min Liu, 'Two Gay Men Seeking Two Lesbians: An Analysis of Xinghun (Formality Marriage) Ads on China's Tianya.cn' (2013) 17 *Sexuality and Culture* 3, 494-511.

103 Here 'performance' is not about a pre-existing subject performing a role insincerely, but the repetition of certain practices to the extent that they become normative and even construct the subjects. See Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, New York, 1990).

104 For the materiality of the law and how the placement of objects in a particular case complicate the power relations, see Bruno Latour, 'The Making of Law: An Ethnography of the Conseil d'État' (Polity Press, Cambridge, 2009); Shigong Qiang, 'How the "Law" Is Practiced: A Case Study on Rural Civil Mediation ("法律"是如何实践的:一起乡村民事调解案的分析)' in Stephan Feuchtwang and Mingming Wang (eds) *Order, Justice and Authority in Rural China* (乡土社会的秩序,公正与权威) 488-520 (China University of Political Science and Law Press, Beijing, 1997).

cooperatively married lesbian and gay man cannot achieve their mission of pleasing their parents and acquaintances by only showing them a wedding or a marriage certificate. Marriage law and marriage registration procedures only validate them as husband and wife in a piece of legal paper, yet for their parents, the effectuation of marriage is embedded and prolonged in daily life, 'naturally' tied up with the most commonplace conjugal activities such as sleeping together and serving tea. When we situate marriage law in these everyday trivialities – the actions of the cooperative couple, the expectation of their parents, the spatial distribution of the kitchen, etc. – we may see the covert long sleeves and chains of the straightjacket more clearly.

In addition to the placement of things in a conjugal house, the very idea of conjugal house also imposes some extra economic burden for cooperatively married women. According to Fish, a 24-year-old lesbian living in Guangzhou:

'I used to live with my parents, without paying rents, of course. Now that I'm married, they naturally assume that I will live with my husband in his house. So, I have to move out and rent another apartment without letting my parents know, which is quite an economic burden for me, and I can't ask them for monetary support. Well, I know it's not good to be "boomerang adult children" (*ken lao zu*) who always reside with their parents or use their money, but I've totally lost this possibility once I got married, while many of my unmarried peers still can.'

Bao's failure to find the tea cup as a wife and Fish's financial predicament as a married daughter both reflect the gendered expectations that cannot be negotiated away in a supposedly egalitarian marriage.<sup>105</sup> Although in cooperative marriages both parties tend to highlight the reciprocal nature of such a relationship and try to be as empathetic as possible, the gendered script of what a marriage should be like can still lead to fights and even breakups. Yuan Yuan<sup>106</sup>, the director of a documentary on cooperative marriage, opined,

'Gay men tend to think that lesbians have the same need [as gay men] to pass as married heterosexuals, and they are in a mutual-help relationship, so splitting everything by half is already egalitarian. They often complain that lesbians are too picky or too greedy, but they do not realize that lesbians in general are doing more unpaid physical and emotional works, especially when they live together with the man's parents, or even worse, when they have a baby.

In this process, lesbians are more likely to cultivate feminist awareness. They would start to bargain with gay men in terms of housework, living expenditure and parental responsibilities. Then gay men come to realize that "traditional" women would not be as demand-

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105 The sociological concept of 'pseudomutuality' can explain these phenomena. Pseudomutuality refers to the situation where spouses profess egalitarian ideals, while still leading their married lives according to some gender-typed roles. See Susan Maushart, *Wifework: What Marriage Really Means for Women* (Text Publishing Company, Melbourne, 2001) 24; Chen, 'Challenges on Traditional Marriage' (2009) 9.

106 This is the real name of the director.

ing and uncontrollable as those “tricky lesbians”. Therefore, they find it more beneficial to simply marry a straight woman, ideally an obedient one, than to cooperate with a lesbian. I think that’s one of the reasons why so many gay men, after seeking for a lesbian for a while, end up conducting “marriage fraud”.’

Yuan’s words captured the deeply embedded gender inequality in many marriages, whether cooperative ones, mixed-orientation ones, or perfectly ‘normal’ ones. No wonder Lan, a lawyer who serves as a voluntary legal consultant on cooperative-marriage issues for a lesbian group in Chengdu, found her work more challenging than giving legal advice,

‘In fact, the visible stuff, like money and child, are relatively easy to plan ahead by referring to law, but it is the invisible things, like the couple’s relationships with each other, with in-laws, and with their respective same-sex partners, that ultimately caused the major troubles. Neither can the law nor can we as lawyers provide a satisfactory solution.’

It is nevertheless also the ‘invisible things’ that make LGBT-friendly lawyers (including lawyers who are themselves LGBTs) helpful. Although any lawyer can help a married couple with the prenuptial agreements or divorce settlement, as we saw in the case of Jasmine and her gay husband, many cooperative-marriage seeking people still prefer a reliable lawyer to whom they can come out. Lan told me that same-sex-oriented people who resorted to her tend to believe that a lawyer can better deal with their cases if she knows their secrets and particular needs. When she got involved as a both a lesbian and a lawyer, she would provide extra emotional support in addition to legal advice. LGBT-friendly lawyers like Lan are still scarce in China, but recent years have seen the emergence of this group<sup>107</sup> as more same-sex-oriented people are entangling with Family Law.

On a side note, there is another particular reason for same-sex oriented people to enter into cooperative marriage, namely, the capricious political environment in China. The suppression of social movements and the restrictive rules on prison visitation have made the straightjacket of marriage a life jacket. After several unwarranted arrests of civil-society activists and police harassment of LGBT events, cooperative marriage turned out to serve another purpose. Some male and female human-rights activists, whether gay or straight, have started to consider getting legally married with one another, so that they could have a trusted ‘comrade’ to count on in case they were in jail. In this sense, the ‘comradeship’ between cooperative partners is not simply metaphoric,<sup>108</sup> but also pertinent in the activists’ political struggles. This is another example of how people’s practices enrich the meanings of marriage.

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107 For the group ‘Rainbow Lawyers’ and their works, see Section 6.3.1.

108 For a discussion of cooperative marriage as rainbow family built on comrade love, see Wang, ‘Cooperative Marriage’ (2015) 133.

### 3.3.2 Making Mixed-Orientation Marriage Work

While the tragic stories out of ‘gay men’s marriage fraud’ are easily accessible online, I decided not to extrapolate from the anger and sorrow of those vocalizing *tongqis* to the millions of couples in mixed-orientation marriages, who might not even know the word ‘gay’ or ‘*tongqi*’. My research began with ‘inconvenience sampling’,<sup>109</sup> trying to find out the underrepresented: the mixed-orientation marriages that do work.<sup>110</sup> The following stories do not intend to beautify these marriages as painless; rather, they are to reveal that, just like many other marriages, a sustaining mixed-orientation marriage can be attributed to many practical considerations that do not always center around sexual attraction and the disclosure thereof.

Unlike *tongqis*, there are very few stories about *tongfus*, i.e., the husbands of same-sex-oriented women.<sup>111</sup> I met Liu, a professor in his late thirties, in an online *tongqi* group, where there were very few *tongfu* members. Liu found out a same-sex affair of his wife when their son was two years old, and she acknowledged that she was attracted to women even before marriage. First furious, he gradually calmed down. He did not want to get divorced, because ‘it would be too troublesome to tell our parents and colleagues about her orientation. After all, people are very nosy, and I’m afraid we’ll both be laughed at’. Apart from saving his social ‘face’, he also had some other concerns about divorce:

‘Had I divorced, my career would be influenced. Am I worrying too much? Maybe. Another problem is the child. If I had the custody, I could not be a full-time father... Anyway, divorce is not a good idea. Plus, what if I cannot get along with my next wife? Then another divorce? Why should I bother?’

Having thought through, Liu tried to communicate with his wife. They decided to stay in marriage, for their own good and for giving their child a ‘complete’ family. Meanwhile, he moved abroad, which created some space for both of them. He also told me that he had managed to focus on his academic life, thus finding sense of achievement there, rather than thinking too much about sex life. He sent half of his salary back to his wife and their child monthly as their living allowance, and they call over Skype every now and then. He expressed,

‘Now I don’t care whom she hangs out with, as long as she cares about the child. And she does. We are not like those broken family who have lost spousal affection – we didn’t have any affection from the very beginning anyway – so it’s actually easier to get along. For us, being friends is already the best solution.’

109 For the methodology of inconvenience sampling, see Section 1.4.3.

110 Here ‘work’ means that the couple do not reduce each other to two antagonizing sexual identities only, and manage to find common ground and sustain the marriage.

111 To date, researches on *tongfus* are scarce, too. See Kui-yu Tang and Hui Yu, ‘Comparison of Maintenance and Dissolution of Gay’s and Lesbian’s Marriage: A Perspective of Simulated Social Anthropology “同妻” “同夫”婚姻维持与解体的比较: 一项虚拟社会人类学研究’ (2014) 16 *Journal of Eastern Liaoning University (Social Sciences)* 6, 75-85.

As shown above, despite some hurt feelings, Liu finally weighed and balanced many factors, and used several tactics to make their marriage work: 1) to maintain friendship instead of spousal love with his wife; 2) to create some physical space from each other; 3) to trivialize sex life; 4) to prioritize his career, and 5) perhaps most importantly, to empathize with the marital pressure his wife was facing in the first place. As he said, 'thinking twice, she's not really faulty. It's the society's fault. If everyone accepts this group, there won't be *tongqis* and *tongfus*.'

Liu's compassion may be part of the reason why, after joining an online *tongfu* group, hoping to find peer support, he became disidentified with this tag:

'I was in an online group of *tongfus*. To be frank, *tongqis* may not dare to find another man for sex, but these *tongfus* talked very openly about finding a mistress or a prostitute. They easily justify these things, which I still think are immoral ... Some even believed that since their wives lied to them, they should revenge and hurt them back. No one stood out and said it was wrong. I couldn't agree so I quit this one as well.'

I did not conduct participant observation in a *tongfu* group, but was frequently following the online discussions in a *tongfu* forum.<sup>112</sup> There, although few bloggers openly discuss extra-marital relationships, most of them do condemn harshly on their 'lesbian'<sup>113</sup> wives for being sexually apathetic, feeling angry about their unsatisfied sexual needs and impeding masculinity. While they complained their wives' constant rejection of them in bed, their depiction also suggested the likelihood of unwanted sex that married lesbians do fear.<sup>114</sup> Liu's own moral standard of marital fidelity (even if his wife had broken it), his unwillingness to push her to have sex, and his non-confrontational attitude towards his wife all made him feel aloof from these *tongfus*.

Later he joined some *tongqi* groups but could not fit in, either:

'Although we are all victims to some extent, the *tongqis* I knew tend to see every man as a suspicious homosexual. Their whole life is taken by such thoughts. Sometimes their negative energies (*fu nengliang*) even disturbed me from working. I found it very hard to persuade them to think otherwise.'

Liu's participation and later disidentification with *tongqi* groups shows the supportive function of a victim-based collective identity on the one hand, and its constructive and constraining effects on the other. The suspicion, sadness and anger, or in Liu's words 'negative energies', that are circulating in these groups are not necessarily an expression of these people's pre-

112 Baidu Tongfu Bar, at [www.webcitation.org/6nKuNzKMz](http://www.webcitation.org/6nKuNzKMz).

113 I use quotation marks because many stories of the self-identified *tongfus* do not even show any evidence of their wives' same-sex attraction, yet still calling them 'lesbians' (*nv tongxinglian*) pejoratively.

114 See above, footnote 99 and accompanying text.

existing feelings. Rather, it is arguably the repetition, exchange and reinforcement of these feelings that produced *tongqi* subjects and homogenize them. This echoes what Ahmed pointed out in other contexts, 'together we hate, and this hate is what makes us together'<sup>115</sup>. Similar production of the individual through the alignment with collective emotions can be found in the above-mentioned *tongfu* groups.

While collective self-victimization is problematic, praising an individual's abilities to become happy and strong is equally over-simplistic. Liu's economic independency, career achievement, global mobility, and the relatively less social expectation on a man to devote much time in parenting have all made it relatively easier for him to let go of the victim mentality, which are not just personal qualities. The personal-social complexity is also shown in the following *tongqis'* stories.

Not all *tongqis* stay in marriage only because they do not dare to divorce. Rou<sup>116</sup>, a self-identified *tongqi* in her forties, is one of the earliest members of an online *tongqi* group. She has been married for more than twenty years, and her husband came out to her as gay seven years ago. Other *tongqis* jokingly called her a 'weirdo (*qi pa*)', because she was rather content about her marriage:

'Now he's my gay best friend (*gay-mi*) – we go shopping and go Karaoke together, and we even watch gay porn together. Since I've chosen not to divorce, I decided to see the positive sides and appreciate his kindness... This may be incomplete happiness, but I still take it as happiness... Sometimes I even encourage my husband to find a same-sex partner – he's really like my son whom I'm eager to find a match for (grimacing face emoji).'

Some other *tongqis* in the group expressed their admiration and said, 'this is love, big love'. Rou agreed, although she also acknowledged that she was 'extremely lucky to have such a happy ending'. As one of the core members of the group, she did not simply advise other *tongqis* to divorce or stay, but patiently helped them to figure out the pros and cons of their respective relationships, while providing her own case as an example of an alternative way of living.

Importantly, Rou's relatively happy story should not be taken as a successful coming-out-in-marriage case, as if only happy and transparent marriages can exonerate 'gay' men from being blamed for marrying initially unwitting straight women. In that case, we fall again into the 'marriage fraud' discourse that condemns the closet and that valorizes honesty as always the best policy before and during marriage. We should instead inquire what made her husband's disclosure and their 'happy ending' possible at all. Some clues can be found from Rou's advice to other *tongqis* in the chatroom:

115 Sara Ahmed, 'Affective Economies' (2004) 22 *Social Text* 2, 117-139, 118.

116 I have sent the Chinese translation of the following paragraphs about Rou to her, and she gave her consent to publish these words.

'Sisters, I suggest you not let your husband's sexual orientation prejudice our judgment on his other aspects. This way you can be more rational and objective, and can lower the harm on each other... Do not assume that homosexuals are abnormal. They're just different...

Also, we should not just 'painfully endure' the marriage; understanding, forgiving, tolerance and appreciation are all important. Of course, such a good marriage is demanding for both parties. Don't forget, a straight marriage is not always smooth, either.'

Apparently, Rou did not demonize her husband's sexuality, and did not over-romanticize straight marriages. She used love, friendship and kinship interchangeably to describe their relationship. Her shuffling of terms – 'gay best friend', 'mother and son', 'big love' – and her disinterest in accurately defining or ranking them dissolves the otherwise biggest problem of 'fraud', thus making her husband's coming out acceptable.

I have to admit that Rou's story is hardly representative in this chat-room full of unhappy *tongqis*. She was aware of it as well, and reminded me not to expand her experience to mixed-orientation marriages in general. Indeed, for many *tongqis* and *tongfus*, unlike Liu and Rou who de-centralized conjugal sex in their marital life, sexual disharmony is considered one of the most insurmountable problems that makes a marriage unbearable. There are other reasons that can lead to a divorce, which I will come back in Section 3.4.2.

### 3.3.3 Mixed-Orientation Cooperative Marriage

Sometimes the line between mixed-orientation marriage and cooperative marriage can be rather thin. Shun, a bisexual-identified woman, is married with a Christian man who had same-sex attraction before marriage but never dared to have same-sex sexual behaviors or a relationship. They fell into platonic love online and decided to marry despite their seemingly incompatible sexual orientation. When I first met Shun, she jokingly identified herself as a *tongqi* who simultaneously made her husband a *tongfu*. However, she actually preferred not using these two terms, but some other words to describe their relationship. Shun said,

'Because we first met online, my husband often joked, "I downloaded my wife from the Internet!" I was like, yes, but downloading me is not enough; you need to learn to unzip me and to clean the virus. To unzip means to see a more vivid, multi-aspect me in real life, and antivirus means that we agreed to consciously overcome the patriarchal and heterosexist ideas and practices that we may have inherited from our original families.'

One and half years later, in a follow-up conversation, Shun told me that after three year's monogamous marriage, they had decided to open up. She fell in love with another man, while her husband started to embrace his same-sex desire, joined some local gay events, and found a same-sex partner. They also developed the previous metaphor, said Shun,

'My husband's lover often said facetiously, "both of you are now zipped again, uploaded, and freely shared!" As this man was looking for a cooperative marriage, he said, "I want to download a lesbian wife, too, but I'm going to put it on the desktop for presentation only; I won't bother unzipping it."<sup>117</sup>

As Shun and her husband encouraged each other to explore more, they came to see clearer what they can and cannot provide each other in marriage, and adjusted their expectations accordingly. Now Shun prefers seeing their marriage as not just a mixed-orientation one, but also a cooperative one, emphasizing open negotiation, respect, boundaries, and mutual support. Shun recalls,

'One day he went out for a date but forgot to bring clothes to change for the next workday, so he asked me to send them over. On my way to his partner's place, I felt blessed. Yes, blessed, because both of us are now free. Interestingly, the more independent we are from each other, the more attached we feel.'

As opposed to the cursed feeling many women have when knowing about the husband's same-sex or different-sex extra-marital affairs, the 'blessed' feeling Shun runs counter to the normative marriage ideal that is tied up to monogamy and heterosexual-romantic love. In Shun's story, marriage has also changed its connotation for the same couple over time. A mixed-orientation cooperative marriage can be deeply bonding, as long as the spouses invest emotions in and give meanings to it. Their needs for and interpretation of love, companionship and freedom are shifting, but such changes turn out to be not destabilizing but conglutinating for their marriage.

The various experiences in Section 3.3 have shown that same-sex-oriented people are able to sustain and even enjoy a different-sex marriage, which debunks the idea that 'marrying a person of the opposite sex is an unrealistic option for gay and lesbian individuals'<sup>118</sup>. This is a belief the majority judges had in *Perry v. Schwarzenegger in the United States*, which is remotely shared by many Chinese lesbian- and gay-identified persons and *tongqis*. This may be an influence of the global gay rights discourse (especially the immutability and true-self rhetoric).<sup>119</sup> These stories also show that although the law in text remains unchanged, people's choices of obeying, using, or resisting it can be very versatile. Their legal consciousness is also

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117 The informed consent of Shun's husband and his partner to use their stories and words has been subsequently obtained.

118 *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921. Dist. Court, ND California, United States (2010) 969.

119 For the symbiosis of tongqi and gay activism, see Jingshu Zhu, "'Unqueer' Kinship? Critical Reflections on "Marriage Fraud" in Mainland China' (2017) *Sexualities*, DOI 10.1177/1363460717719240.

creating other sources of legalities that compete with the official one, as seen in the tension between negotiated or tacit open marriage and legally prescribed monogamy in all the cases described above.<sup>120</sup>

Of course, the fact that millions of same-sex-oriented people have been married and have made marriage work (although often imperfectly) does not mean that they all ‘voluntarily chose’ to marry in the first place, because no other equivalent options, either same-sex marriage or legally recognized partnership, were available. Not all marriages involving same-sex-oriented people are satisfactory, either, as the following separation stories will illustrate.

### 3.4 TAKING OFF THE MARRIAGE STRAIGHTJACKET

As marriage is deemed more pragmatic and less sacred, divorce becomes less scary, too. Nowadays, it is commonplace in China that a married couple maneuver the marriage and divorce certificates in order to maximize their interests. For instance, some ‘fake’ a divorce and remarry, in order to purchase a second apartment for tax advantages,<sup>121</sup> or to secure double compensation for house demolition and resettlement;<sup>122</sup> some ‘fake’ a marriage and then divorce to get the residence permit in a preferable place,<sup>123</sup> or to get a ‘birth permit’ for an unborn child.<sup>124</sup> All these practices show that law is not something people always carefully obey. The same can be said to cooperative and ‘fraudulent’ marriages of same-sex-oriented people, who get divorced for various reasons. This section discusses the breakdown of these marriages, either consensually or via litigation.

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120 The non-monogamy of same-sex-oriented people in different marriages is discussed in (forthcoming) Jingshu Zhu, ‘We’re Not Cheaters’: Polyamory, Mixed-Orientation Marriage and the Construction of Radical Honesty’ (2018) *Graduate Journal of Social Science*.

121 *Wang v. Zhao*, Shijingshan Court, Beijing, 2014, No. 1544 (王×与赵×离婚纠纷一案民事判决书, 北京市石景山区人民法院 (2014) 石民初字第1544号), where the plaintiff claimed that he married the defendant only because she and her real husband wanted to buy a second apartment, which entails an enormous amount of deed tax. If she got divorced and married to the plaintiff, this property would be their first one and it will be much cheaper. For more analysis on the interweaving of marriage and real-estate policies in China, see Davis, D. 2010. ‘Who Gets the House? Renegotiating Property Rights in Post-Socialist Urban China.’ *Modern China* 36 (5): 463-92.

122 *Hao v. Yang*, Shapingba Court, Chongqing, 2014, No. 10500 (郝某某与杨某某离婚纠纷一案民事判决书, 重庆市沙坪坝区人民法院 (2014) 沙法民初字第10500号).

123 For instance, Hui Zhang, ‘Sham Weddings to Scam Hukou’, *Global Times*, 13 March 2012, at [www.webcitation.org/6nLXjet6r](http://www.webcitation.org/6nLXjet6r).

124 *Zhang v. Ge*, Xiangyin Court, Hunan, 2014, No. 810 (张某某与葛某某同居关系子女抚养纠纷一案一审民事判决书, 湖南省湘阴县人民法院 (2014) 湘阴一初字第810号). For more about the ‘birth permit’, see Section 4.2.1.

### 3.4.1 Separation after Cooperation

Divorce may be an appalling event for those who wish for a happy-ever-after story. However, many of my respondents in cooperative marriage tend to be less perturbed by the idea of divorce, probably because most of them have well prepared for, even looked forward to, its happening. Some would agree beforehand on the estimated time to terminate their marriage contract,<sup>125</sup> although if one party changed his or her mind, the court may not support the other's request for divorce.<sup>126</sup>

Refusing to equate a long-term marriage with success, Xiong, the organizer of the above-mentioned cooperative-marriage match-making group, emphasized the importance of rethinking the common-sense linkage between divorce and failure:

'Some *lalas* and gays complain that their marriage failed because they ended up a divorce. However, we cannot say something is a success or a failure without seeing its original purpose. For instance, if you only intended to have a wedding to save your parents' face, then your marriage is already successful when the wedding was done; it is still successful even if you guys split up afterwards. Or, if your purpose is to have a biological child cooperatively, then a divorce is not that important, either, as long as both are still responsible parents. Never be too greedy, and never forget the point from which you started.'

Some cooperatively married same-sex-oriented people, just like many heterosexual couples, would utilize the laws and policies on marriage and divorce to maximize their benefits. For instance, after the marriage certificate helped them to give birth to a child via lawful procedures of artificial insemination in a state-owned hospital, Jasmine got divorced with her gay husband so that she could be eligible to buy a welfare housing that is only provided for the unmarried in Beijing. They had also planned the next step, i.e., to re-marry after she bought the house, because they did not want their daughter to have only one parent and thus be discriminated at school.

Of course, not all cooperatively married couples choose to divorce pragmatically. Many of them separated with grudges against their spouses and/or parents-in-law. In some cases, despite all the passing and performing, some people's same-sex orientation still ended up being unexpectedly exposed to their parents. Looking back, they may think the whole idea of cooperative marriage simply self-deceiving and counter-effective, possibly with much worse consequences than straightforwardly coming out. For instance, Mama Wu, a mother who first openly supports her gay son in China and then became a gay rights activist, shared a letter from a gay man in one of her blog articles. It is about a cooperative marriage that turned into an accused 'fraudulent' marriage. According to the gay man, his lesbian wife denied their cooperative-marriage oral agreement and insisted that she

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125 See Article 2 of the sample contract in Section 3.3.1.

126 See above analysis in footnote 95 and accompanying text.

wanted to have ‘normal’ sex in marriage.<sup>127</sup> Her parents believed that their daughter was heterosexual, accused him angrily for his homosexuality and dishonesty, and asked him for mental-damage compensation. Their dispute was brought to court. The judges recognized the cooperative nature of the marriage, and decided that the woman should return him seventy percent of the betrothal gift. The woman’s family filed an appeal, the judgment of which is unknown.<sup>128</sup> Mama Wu commented that this cooperative marriage was a ‘lose-lose game (*liangbai jushang*)’, and that had he come out earlier to his parents, he could have avoided all the dramas.<sup>129</sup> The man ended his story with a call for *tongzhi* to be their ‘true selves’, and Wu also warned other *tongzhi* to take a lesson from his experience and never enter into cooperative marriage.

However, not every same-sex-oriented person who was once forced or seduced into different-sex marriage can afford, financially or emotionally, to come out to their parents, even after a cooperative marriage fails. Having just recovered from an exhausting divorce, some of them would soon restart searching for another cooperative marriage, with adjusted expectations and requirements. Yun, a twice-married lesbian whose parents are extremely conservative according to her, said jokingly,

‘People say marriage is the grave of love, but I didn’t expect that even a “fake” cooperative marriage could attract a homewrecker, a grave robber (*daomu zei*)! My ex-husband and I had agreed not to have children, but when he found another lesbian who was willing to give birth, he immediately changed his mind, left me and got married with that woman. After this experience, I learned that it is very important to find someone who is compatible in terms of values and future plans. Now I’m married to a gay friend of mine.’

After divorce, Yun did not completely abandon the idea of cooperative marriage, because she still needed such a married status to comfort her parents. Her second marriage has been smoother, and as the parents from both sides gradually accepted their wish not to have children, the marriage is now less stressful. For many lesbian- and gay-identified people, having a short marriage history suffices to give them a ‘normal’ appearance, as the society seems to put less stigma on the divorced than the never married. For Yun, however, they two are similarly unbearable – staying outside the ‘grave’ in whatever way feels scarier than squeezing into it. Divorce is therefore a temporary stepping stone to re-strategize her next marriage.

In sum, there can be widely different reasons why a cooperative marriage ends: 1) the divorce can be well-planned from the very beginning; 2) a couple may separate for some benefits available only to single persons,

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127 See Three-Color Flower Wu Youjian (三色堇吴幼坚), ‘The Gay Man Said It’s Cooperative Marriage but the Woman Said It’s Marriage Fraud, so They Went to Court’ (男同说是形婚但女方指责“骗婚”于是打官司), *Sina Blog*, 4 March 2016, at [www.webcitation.org/6mZfMmvwN](http://www.webcitation.org/6mZfMmvwN). Unfortunately, I could not find the first-instance judgment online.

128 Ibid.

129 Ibid.

just like they may get married for the advantages attached to marriage; 3) they may also divorce after their sexual orientation is exposed to their parents, thus making it unnecessary to have marriage as a 'sham', unless their parents still want them to keep this social outfit on; or, 4) they may separate upon disagreement of major issues (like money or child) or with the accumulation of trivial disputes. These different situations remind us that a cooperative marriage that ends up with separation is not equal to a failure, nor is it a proof of the failure of cooperative marriage as a coping strategy in general.

### 3.4.2 Mixed-Orientation Divorces in Courts

From the published judgments of most court cases about mixed-orientation marriages, we could only see the complaints of the straight spouses (more *tongqis* than *tongfus*) and their determination to divorce. Similarly, the stories on media often equate divorce as a verdict of a miserable future for *tongqis*. However, these texts say little about the possibly ambivalent feelings of both parties when splitting up. What is missing is also how the law is perceived and used, during or outside a lawsuit. This section depicts one *tongqi's* divorce experience, which gives us a more complicated picture of mixed-orientation marriage from a socio-legal perspective.

Rouge is a self-identified *tongqi* living in an underdeveloped village. When she sought for my legal advice in an online *tongqi* group in 2014, she was twenty-seven, a mom of a two-year-old son. Rouge told me that she and her 'gay'<sup>130</sup> husband were junior-high classmates but lost contact after a short puppy love. When they were both in their marriageable age, an acquaintance served as a matchmaker and reconnected them. As the parents of both sides were satisfied, they got married soon. Later, according to Rouge, she found her husband 'sexting' with another man. She started to look for information on the Internet, learnt about homosexuality and found other women who call themselves *tongqis*. Half a year later, she decided to divorce.

Rouge did not finish senior high school, but she worked hard to teach herself the divorce law. She did not trust any lawyer; and even if she did, she could not afford one. I introduced her to a pro bono service center in Beijing that helps lower-class women. However, since the hearing was only a week away when she finally visited them, the lawyers there thought it was too late to collect enough evidence to win the case, so they politely turned her down. Upon her request, I agreed to go to her village and provide as much legal assistance as I could, while taking it as part of my fieldwork upon her consent.

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130 Since the whole story is one-sided narrative, I cannot confirm if her husband is 'gay', either in terms of behavior or identity. Therefore, I use quotation marks to leave space for reasonable doubt.

After a bumpy drive through the dusty country road, I arrived at the cottage of her family. On her bed, I saw some law books and popular romantic novels. She must have read thoroughly the booklet of *Chinese Marriage Law and Relevant Judicial Interpretations*, because highlights and notes appeared everywhere. She had also carefully studied a handbook on legal practice in divorce cases. Disappointed and angrily, she complained, 'I think Chinese marriage law is totally outdated! You see, it says nothing about a man having affairs with another man. It doesn't protect millions of poor *tongqis* like me!'

Of course, these law books did not suffice to equip her with practitioner's skills. When I suggested her that she should collect as much evidence as possible about every claim she was making, such as the proof of common property and the concrete evidence of her husband's infidelity, she insisted that it was unnecessary:

'I know his salary, and I know from a friend that he had entered into a hotel with another man, so I am the evidence. He knows it, too. As long as he admits it in court, why do I need to provide any other evidence? If he doesn't admit, the court will find out.'

I tried to help her to find some witnesses of the alleged domestic violence, since she did not take pictures of any bruises or keep the invoices of medical treatment. She told me that the cadre of her workplace had once seen bruises on her face. However, when I asked him to provide some written or verbal testimony for Rouge's divorce proceeding, he turned me down stoutly. I tried to persuade him, telling him the seriousness of domestic violence, if it really happened. Looking vexatious, he told me he saw some bruises on Rouge once, but he would never present as a witness in a divorce case. 'You know', he quoted a folk's proverb: 'You'd rather pull down ten temples than separate a married couple.'<sup>131</sup> Such a powerful non-legal norm exists in parallel with the law's allowing for divorce in the villagers' mind, and the former often gains the moral high ground. This proverb suggests that marriage is so important in the secular life that Chinese folks would rather symbolically 'offend the Buddha' than testify against a married person.

The cadre continued that he wished the couple stayed together because, citing another wisdom, 'there is no overnight hatred between husband and wife'<sup>132</sup>. He also believed that even if they had to divorce, they had better do it in a merciful and humble way to save face for each other. Going to court and accusing the other party was a bad idea, said the cadre, shaking his head. In terms of his accused homosexuality, he expressed even more unwillingness to talk about it, as if such accusation shamed not only Rouge's husband, but also everyone else who heard this word. Therefore,

131 The Chinese words are '宁拆一座庙,不破一桩婚'.

132 The Chinese words are '夫妻没有隔夜仇'.

I was not able to get any legally valid evidence for the alleged domestic violence, nor did I see any direct proof of his husband's being 'gay'.

In her written submission, Rouge requested the court to grant a divorce and to divide the communal property. She also requested to give custody to both of them in turn, which is in fact an invalid claim, because according to Chinese Marriage Law only one person can have the custody, while the other can have the visitation right.<sup>133</sup> She also claimed for compensation for mental injury due to the 'fault' of cheating, but as discussed in Chapter 2, the law only sees long-term different-sex extra-marital cohabitation as a 'fault' and therefore as a ground for compensation.

The night before the hearing, Rouge seriously rehearsed her oral statement again and again. Since her dream was to be a hostess on TV, she enjoyed reading aloud the sensational words she wrote about homosexuals' 'fraudulent' behaviors and *tongqis'* tragedies. Her mother persuaded her not to use the homosexual arguments because she believed the judges would not buy them. Rouge insisted and they had a small fight.

Although I provided legal advice to Rouge as a law graduate who had passed the bar exam, as a non-practitioner I was not able to accompany her during the proceeding. Her anxious parents were waiting outside, too, because this divorce case was deemed inappropriate for public hearing for the sake of the parties' privacy. Rouge presented as evidence the flirtatious (in her words, *aimei*) text messages between her husband and a male friend of his that she found on his phone.<sup>134</sup> However, later she told me that she did not make the speech about the *tongqi* phenomenon as she prepared the previous night, because she 'felt nervous and sensed that the court was not willing to hear any argument about homosexuality'.

The decision came out two months later. In the two-and-half-page judgment, the word 'homosexuality' or any relevant reference did not show up at all. In the merits part, it is stated, like in many other divorce cases, that:

'...The plaintiff and the defendant lacked sufficient understanding before marriage and they frequently had conflicts for trifles. Since the defendant agrees to the plaintiff's request for divorce, the court confirms that their spousal affections have broken down. Therefore, a divorce should be granted...

The plaintiff claimed that the defendant is violent and not suitable for raising the child, but failed to provide sufficient evidence. Moreover, since the boy is now residing with the defendant and his parents, it is not beneficial for the child to change a living environment. Therefore, the court grants the custody to the defendant, and the plaintiff should provide an alimony of 200 RMB per month...

The claim for mental and material compensation for injury lacks legal ground and is therefore dismissed...'

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133 Articles 36-38.

134 Whether this evidence infringed upon her husband's privacy was not discussed in court. The court did not recognize this evidence, either, because homosexuality itself is not a legally determinant factor in a divorce case.

Rouge felt very disappointed with the judgment. She complained about the outright 'illiteracy' of the judge about homosexuality and *tongqis*. She also felt unjust, because not only did she lose the custody but she also had to provide alimony to her ex-husband who was better off than her. In practice, moreover, her visitation right could not be exercised smoothly, because the parents of her ex-husband were very hostile to her. She said that they often kept the boy in the bedroom and stopped her at the front yard. Their arguments even turned into physical violence sometimes. Overall, she found the law or the court of little help in these daily frictions.

Unsatisfied with the authorities, Rouge tried to find other ways to air her anger and do justice for herself according to her own belief of what is right or wrong in marriage. She began to read some psychological self-help books she asked me to recommend her, so as to build up some 'positive energy'. On the other hand, Rouge kept spending most of her spare time on the online *tongqi* groups, even initiating a group on her own. There, she shared her own stories, consoled other newly identified *tongqis*, and gave them advice about divorce and lawsuits as an experienced person. She also kept writing blogs to condemn the 'fraudulent gay husbands' and the incapacity of China's judicial system. Moreover, she found a journalist from a mainstream magazine to report her story,<sup>135</sup> calling on younger women to pay more attention to the potential 'marriage frauds' conducted by gay men.

Meanwhile, Rouge was also planning to let go of the past unhappiness and to pursue her new career and new life in Beijing after she finished a dressing and makeup course. However, later she told me that she was not able to leave her hometown, because her father was in bad health and her family needed her help with farming. She was also afraid her rural background would disadvantage her in the metropolis. The injustice and helplessness Rouge felt in her marriage and divorce does not merely come from the law's lack of punishment for same-sex extra-marital affairs. Her grievance, and that of many other vocalizing *tongqis*, is a manifestation of many interweaving socio-economic problems in contemporary China that makes marriage painfully beneficial and non-marriage often more precarious.

We can catch a glimpse of the intersecting difficulties from Rouge's story: the *hukou* system that controls movement of population confines rural women's job opportunities;<sup>136</sup> women usually shoulder more expectation

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135 The journalist went to interview Rouge because, like many other mainstream media, he wanted to 'bring voice to the vulnerable group'. Nevertheless, two years after he interviewed Rouge, I received a message from him: 'Do you think he's husband is really gay? How can we know?' In fact, these are crucial questions that many journalists fail to ask when they side with *tongqis* and categorically condemn the married 'gay' men. The fact that there is no hard-and-fast criterion that can establish one's being 'gay' also suggests that the Marriage Law and the courts technically cannot punish a suspected 'gay' husband.

136 Zhiqiang Liu, 'Institution and Inequality: The Hukou System in China' (2005) 33 *Journal of Comparative Economics* 1, 133-157.

on childrearing and elder care;<sup>137</sup> the shrinking of social welfare have made it more difficult for women to live alone;<sup>138</sup> and the state's propaganda that shifts eldercare responsibility to core families also gives moral and economic pressure on women with non-normative lifestyles.<sup>139</sup> Apparently, Rouge is not the only one who is facing such harsh conditions. *Tongqis*, their 'gay' husbands and people in 'normal' marriages alike, are all circumscribed by the fears, anxieties and hope that emerge from an era that promises and often fails to provide happiness in marriage.

### 3.5 CONCLUSION

This chapter has described how same-sex-oriented people arrange their life in and outside of marriage, and how there is no ultimate 'outside'. Family Law 1, 2, 3 and 4 are all playing a part to construct marriage and its overarching shadow. FL1 stipulates what a state-sponsored marriage looks like, by spelling out the details of marriage formation, common property, separation, etc. FL2 is shown in property law, which regulates 'non-familial' affairs, such as property disputes between same-sex partners.<sup>140</sup> Another example of FL2 is prison visitation, where only 'relatives' are allowed.<sup>141</sup> The rules on the anonymity of parties in published family-court cases can be said to be FL3, which does not explicitly favor heteronormative families but unintendedly treats same-sex ex-partners in disputes as not deserving privacy protection.<sup>142</sup> FL4 are also ubiquitous in this chapter: the gendered division of labor in marriage (men as breadwinner and women caretaker);<sup>143</sup> financial ability as men's entrance ticket to the dating pool;<sup>144</sup> the expected manners of a daughter-in-law towards the elders;<sup>145</sup> the folks' proverbs on marriage and divorce,<sup>146</sup> and so on.

Marriage as part of a straightjacket embodies multiple features: It keeps warm, in a sense that married people can obtain a host of economic benefits guaranteed by law, as well as social decency and maturity. It is uncomfortable, because it always fails to deliver the package of love-sex-happiness as

137 Heying Jenny Zhan, 'Aging, Health Care, and Elder Care: Perpetuation of Gender Inequalities in China.' (2005) 26 *Health Care for Women International* 8, 693-712.

138 Joe CB Leung, 'Social Security Reforms in China: Issues and Prospects' (2003) 12 *International Journal of Social Welfare* 2, 73-85. The *hukou* issue will be further addressed in Chapters 4 and 5.

139 For the shifting ideology, see Jing-Bao Nie, 'Erosion of Eldercare in China: A Socio-Ethical Inquiry in Aging, Elderly Suicide and the Government's Responsibilities in the Context of the One-Child Policy' (2016) 41 *Ageing International* 4, 350-365.

140 See Section 3.2.3.

141 See footnote 14 and accompanying text.

142 See footnotes 69-71 and accompanying text.

143 See footnote 106 and accompanying text.

144 See Section 3.2.1.

145 See footnote 104 and accompanying text.

146 See footnotes 131, 132 and accompanying text.

it promised. Such failure has always already been acknowledged by the law, as shown in the pragmatic judgments of numerous divorce cases. Moreover, marriage is a highly gendered outfit, disadvantageous to women in many aspects (yet not in a deterministic way), especially in real-estate ownership and unpaid domestic labor.

The aspirational, pragmatic, and gendered features of the marriage straightjacket are influencing everyone living under its shadow. Chinese same-sex oriented people deal with the pressure to marry in different ways, including staying celibate (or claiming to be so), living with (and/or ritually marrying) their same-sex partners, getting married cooperatively with a same-sex-oriented person of the other sex, or getting married with or without letting the spouse fully know their sexuality. In all these life paths, law is a basic constitutive element of their marital choices, making these 'choices' never purely voluntary. At the same time, their practices are also reshaping the law, either by pressing the authorities to make updated interpretations of existing law, or by gradually molding informal legalities that are now competing with the hetero-monogamous state law.

Such push-and-pull interaction is well exemplified in the cooperative marriages between Chinese men and women who are to various degrees attracted to people of the same sex. Once married, the cooperative spouses have to lead their life according to the formal and substantial rules on marriage. They are also bound by the social norms that make a marriage culturally valid, as we have seen in the obliged show-up in family gatherings, or in the almost failed performance of a supposedly filial daughter-in-law who could not find the tea cup.<sup>147</sup> Meanwhile, they also exercised their agency despite the constraints, showing the with- and against-the-law attitudes: some of them envisage in detail the possible legal disputes during marriage and try to preemptively solve them; even if not signing prenuptial agreements, they would verbally negotiate the rights, obligations and exonerations of each party, more carefully than an average heterosexual couple would do; they tend to worry less about divorce, since many of them see marriage more as a social outfit than a life-long commitment with the beloved; they are also more likely to challenge the normativity of monogamy, since the existence of their extra-marital same-sex relationships have already made them somewhat non-monogamists. Therefore, cooperative marriages can be said to have been reshaping the institution of marriage and its laws.

On a broader scale, however, the transformation of marriage is always already ongoing in China, and cooperative marriages are simply speeding it up and making it more noticeable. The prenups, the egalitarian negotiation, the friendly assistance and even the non-monogamous practices have

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147 See footnote 104 and accompanying text.

appeared in 'ordinary' marriages in China as well,<sup>148</sup> with the democratization of intimate relationships in both Western and Chinese societies.<sup>149</sup> In this sense, cooperative marriages are not distinctively 'fake' and 'queer'. Instead, straight people's marriages have always already been 'fake' and 'cooperative': while contemporary marriage insists on perpetual, exclusive, altruistic, hetero-romantic love, many business-like practices and pragmatic dispute settlement have 'contaminated' such an ideal.

Despite some critiques of it as coopted by the dominant familial ideology, cooperative marriage's subversive potentials generally receive positive remarks in academia and a few mainstream media that noticed this phenomenon.<sup>150</sup> In comparison, 'gay' people's entering into different-sex marriage is seen as much more despicable, because they are believed to be cheating and thus hurting the innocent heterosexuals, especially their straight wives or *tongqis*. However, if examined from the law in text, a mixed-orientation different-sex marriage, even if one with sexual secrets, is lawful, as long as it meets the formal and substantial requirements of a marriage. The legal validity of such marriages then heavily clashes with the moral code of spousal fidelity, and it is the inability of the law to punish or deter the 'dishonest' married gay men that made *tongqis* feel even more anger and pain.

However, while the most ignited and circulated emotions in mass media are the hatred and sadness of *tongqis* towards 'gay frauds', in everyday life spouses in mixed-orientation marriage do not always end up as enemies. As shown in the stories of a *tongfu*,<sup>151</sup> a *tongqi*,<sup>152</sup> and a bisexual woman,<sup>153</sup> spouses have used various strategies to make their mixed-orientation marriages work: avoiding overrating or dramatizing one's same-sex attraction; forgoing victim mentality; lowering the expectation of a romantic-sexual marriage; redefining love and rethinking its relations to friendship and kinship; and renegotiating the rules in marriage. In this process, they also presented different feelings that exceeds hatred and sadness, including satisfaction, friendship, blessing, etc., which deserve more academic and media attention.

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148 For the prenups between straight spouses, see Davis 'Privatization of Marriage in Post-Socialist China' 565. For the practice of non-monogamy, see Fang Gang, *Swingers: A Research into Intimate Relationships* (换偶者：亲密关系研究) (Taiwan Universal Press, Kaohsiung, 2011).

149 See Anthony Giddens, *The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Societies* (Stanford University Press, Stanford, 1992); Sara L Friedman, 'The Intimacy of State Power: Marriage, Liberation, and Socialist Subjects in Southeastern China' (2005) 32 *American Ethnologist* 2, 312-327.

150 See above, footnotes 78-80 and accompanying text.

151 The story of Liu, in Section 3.3.2.

152 The story of Rou, in Section 3.4.2.

153 The story of Shun, in Section 3.3.3.

At the same time, unhappiness does exist in some *tongqis'* marriages, especially in those who cannot tolerate their husbands' homosexuality yet do not dare to divorce. They choose to painfully stay in marriage, for fear of the potential risks in losing custody and economic security, as well as of the stigma on female divorcees. These considerations often outweigh their spouses' sexuality. Similarly, as illustrated in Rouge's story, the injustice and helplessness felt in heartbrokenly divorced *tongqis* do not merely result from the non-disclosure of homosexuality. Instead, it is a mixture of gender, class and rural-urban inequalities that have already existed in marriage and in Chinese society at large.<sup>154</sup> Therefore, simply insisting on gay disclosure without tapping into these intersecting problems can hardly save those unhappy women from the straightjacket of marriage that binds them and their husbands alike. The issues of 'fraud' and disclosure will be revisited in Chapter 7.

Although cooperative or mixed-orientation marriages are still the major ways for Chinese same-sex-oriented people to cope with the pressure to marry, more and more people, whether straight or gay, are now willing and able to resist marriage. This chapter has also shown how same-sex couples, despite the lack of legal recognition of their relationships, nonetheless create legalities via various means. For instance, some use weddings without marriage to gain public legitimacy for their relationship, and a lesbian couple have given new meanings to their real-estate certificate as if it were a marriage certificate.<sup>155</sup> As an increasing number of people arrange their intimate life without getting married, Chinese legislature and courts are expected to deal with more rights demands and disputes emerging from these relationships.

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154 See Zhu, 'Unqueer Kinship?' (2017).

155 See Section 3.2.2.

The previous chapter has discussed the paradoxical socio-legal imperative that same-sex-oriented people should both hide and disclose in different-sex marriages. Related to that is another impasse: they are pushed to become parents but not with their same-sex partners. This chapter looks in detail at how the straightjacket that binds parenthood to different-sex marriage is designed, how same-sex-oriented people eschew it, put it on or wriggle out of it, and what sorts of Family Law (FL) 1, 2, 3, 4<sup>1</sup> and legal consciousness interact in the process. My analysis will proceed along the following lines: Same-sex-oriented young adults, like most of their heterosexual peers in mainland China, are urged to become parents (Section 4.1). However, lawful access to parenthood is mainly open to different-sex married couples (4.2). Accordingly, same-sex-oriented people who want to have children without entering into different-sex marriages face more legal risks and practical inconveniences (4.3). Some become parents in mixed-orientation marriages, yet in this scenario, 'gay' men have to withstand the accusation of having conducted 'womb fraud', in addition to the afore-discussed stigma of 'marriage fraud' (4.4). Cooperative marriage, in comparison, could cloak same-sex-oriented parents with legal conveniences and certain moral recognition, which has empowering effects but also restraining ones (4.5).

This chapter mainly discusses single and coupled parenthood in and outside of different-sex marriage, but I am aware that there are other diverse and marginalized forms of relationships and parenthood that I do not address here, such as parenting in a polyamorous household or in a queer community. Another scenario this chapter cannot cover substantially is that some elderly gay men are less interested in having a son of their own than having a lover or many lovers of what would have been their son's or even grandson's age. I will come back to this point in the discussion of old age in Chapter 5.

Also, there are same-sex-oriented Chinese people who do not want to become parents at all. For instance, some lesbian feminists have made a 'certificate of infertility (*buyun buyu zheng*)' as a parody and sold it on their web shop. As the words 'certificate' and 'disease' share the same pronuncia-

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

tion in Chinese, they deliberately twist the childless status that often has pathological and shameful connotations in this pro-fertility culture into something they are proud of.<sup>2</sup> Nevertheless they were forced to withdraw this product from their store by the administrator of the shopping platform, on the specious ground that the certificates were forgeries.<sup>3</sup> Many other attempts by same-sex-oriented people to resist the imperative to have children will unfortunately not be covered in this thesis, which deserve elaboration elsewhere.

Since gender and sexual orientation are closely intertwined in terms of marriage, reproduction and parenting, it is worth emphasizing at the beginning of this chapter that both queer and feminist perspectives are indispensable in the discussion of same-sex-oriented people's rights, obligations and life experiences of parenting. However, feminist and queer standpoints do not always converge.<sup>4</sup> The tension is particularly noticeable in the discussion of 'womb fraud' in contemporary China. Before going into the details, let us first examine how Chinese same-sex-oriented young adults experience parenthood as part of the straightjacket that both arms and hinders them.

#### 4.1 THE PRESSURE TO HAVE CHILDREN

In contemporary China, many unmarried young adults, regardless of sexual orientation, are facing enormous pressure to get married and give birth. Before the Universal Two-Child Policy<sup>5</sup> promulgated in 2016, China had been pursuing its Family Planning Policy<sup>6</sup> since 1979. This now abandoned policy still imposes huge responsibilities and pressures on the 'only-child'

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2 Online conversation with Xiao Meili (as she is called in the Chinese lesbian feminist activists' community), 29 May 2016.

3 Ibid. This is a feeble excuse to erase anti-reproductive feminist advocacy, because there is not a legal, original copy of the infertility certificate in the first place which they imitated and forged. And no reasonable person would believe the authorities would make such a 'certificate', so arguably there is no substantial harm to other people or to the society that can justify the taking down of the product.

4 See e.g., Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism* (Glasshouse Press, London, Sydney, Portland Oregon, 2005); Janet E Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton University Press, Princeton, 2006).

5 Law on Population and Family Planning (2015 Amendment) adopted 27 December 2015, effective 1 January 2016, Article 18 (1): 'The State encourages a husband and wife to have two children.'

6 It is imprecise to call the previous Family Planning Policy 'one-child policy', because a second child had been allowed in rural areas if the first one is a daughter. For a detailed introduction, see Susan Greenhalgh and Edwin A Winckler, *Governing China's Population: From Leninist to Neoliberal Biopolitics* (Stanford University Press, Stanford, 2005); Hong Zhang, 'From Resisting to "Embracing?" the One-Child Rule: Understanding New Fertility Trends in a Central China Village' (2007) 192 *The China Quarterly* 855-875. See also, below footnote 22.

generation, because if they failed to have children, their family line would end.<sup>7</sup> The words of one gay Chinese man I interviewed expressed the concerns of many young people, straight and gay alike: 'I have to carry on the family line; I have to answer to my family', he said, 'If only my parents had two kids!'<sup>8</sup> The extra pressure on the only-child generation to procreate can also be found in the online cooperative-marriage ads, wherein many same-sex-oriented people explicitly attribute their wish to have a child to their only-child status and filial piety.<sup>9</sup>

How the new law will affect same-sex-oriented people requires further research, but an interesting phenomenon is already emerging. Immediately after the passing of the two-child law, some same-sex-oriented teenagers have already started planning to persuade their parents to have a second child while they are still physically able to do so.<sup>10</sup> Instead of coming out while being the only child, they think a better solution would be to have a (hopefully straight) sibling who, in the future, will be able to fulfil his or her duty to procreate. Afterwards the same-sex-oriented 'only child' can decide whether to come out or not. Of course, this may impose more pressure on the new sibling, who may not want to have a child, either.

For both closeted and openly same-sex-oriented people, pleasing parents with a grandchild seems an instantly effective way to distract their attention from the young adults' private life. It could also alleviate older parents' worries about their children's ageing and dying alone (*gudu zhonglao*). This is evident in the coming out story of two gay respondents. Wang Yu and Zhao Jun had been together for seven years when they became parents through transnational surrogacy. Zhao coaxed his parents to have a 'vacation' with them in Thailand, but in fact they were flying to Bangkok to pick up their newly born baby. He came out to them right before departure. The parents were shocked at first, but their mood quickly changed upon arrival, as they started to focus on the good news that they would soon have a granddaughter. 'How could they blame us if their greatest concern, that being gay equals being barren, was relieved?' said Wang, who planned to do the same thing in two years' time, i.e., to come out to his parents after having a biological child via surrogacy.

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7 Francine M Deutsch, 'Filial Piety, Patrilineality, and China's One-Child Policy' (2006) 27 *Journal of Family Issues* 366-389, 366.

8 Zi Heng Lim, 'For Gay Chinese, Getting Married Means Getting Creative', *Atlantic*, 11 April 2013, at [www.webcitation.org/6f4P3a4pS](http://www.webcitation.org/6f4P3a4pS). Wang's research also shows that 'single children face great pressure than their peers with siblings', see Yingyi Wang, 'Cooperative Marriage: A "Fake Marriage" or a New Intimate Alliance?' (Degree Thesis of Master of Philosophy, The University of Hong Kong, 2015) 61-62.

9 Min Liu, 'Two Gay Men Seeking Two Lesbians: An Analysis of Xinghun (Formality Marriage) Ads on China's Tianya.cn' (2013) 17 *Sexuality and Culture* 3, 494-511.

10 See for instance, an anonymous post on the Internet: 'How Could Closeted Homosexuals Persuade Their Parents to Have A Second Child? (未出柜同性恋应如何劝父母生二胎?)', *Zhifu*, at [www.webcitation.org/6l0cf12J0](http://www.webcitation.org/6l0cf12J0).

Like the imperative to marry, the pressure to procreate is also gendered. While men live under the burden of expectation to pass on the family name, unmarried 'left-over women' are told that the most appropriate age of giving birth is before 28, or at most 35, a 'scientific truth' constructed by some gynecologists and 'relationship experts' in the media.<sup>11</sup> Powered by the dominant medical and psychological discourses, the reproductive imperative goes hand in hand with the anxiety about ageing, and with the hyper-consumerism of contemporary China, where female youngness and fertility are both over-emphasized. Such pressure is directed in particular at women of marriageable age.<sup>12</sup> In fact, the 1992 Chinese law explicitly acknowledged women's control over their own bodies and their reproductive choices for the first time: 'women have the right to child-bearing in accordance with relevant regulations of the state *as well as the freedom not to bear any child*'.<sup>13</sup> However, the right to abstain from reproduction is not feasible for everyone, especially when women are not given equivalent alternatives that can guarantee both social normalcy and wellbeing in their later years.<sup>14</sup>

Married but childless women are not insulated from this stress, either. As described in Chapter 3, Shun (a married bisexual) and her husband (a self-identified gay man) have been trying to negotiate an open, communicative, and loving 'mixed-orientation cooperative marriage'. However, when it comes to the issue of children, she still had some complaints: 'For women, giving birth to a child is definitely a huge task with great responsibilities, and you can't put that in your CV.' The disagreement on whether and when to have children finally lead them to divorce after the attempt for open marriage.

Shun's concerns about the tensions between motherhood and career are not groundless. It is clearly written into law that employment contracts or service agreements shall not contain restrictions on a female employee's rights to marry or bear children.<sup>15</sup> No entity may, for reasons of matrimony, pregnancy, maternity leave or breast-feeding, reduce a female employee's wage, dismiss her or unilaterally terminate her labor (employment) contract or service agreement.<sup>16</sup> In practice, however, employers often circumvent the letter of the law. Without explicitly admitting it, they prefer to hire a man

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11 Leta Hong Fincher, *Leftover Women: The Resurgence of Gender Inequality in China* (Zed Books, London, 2014).

12 See e.g., Luzhou Li, 'If You Are the One: Dating Shows and Feminist Politics in Contemporary China' (2014) *International Journal of Cultural Studies* 1-17.

13 Law on the Protection of Women's Rights and Interests (2005 Amendment), adopted 28 August 2005, effective 1 December 2005, Article 51, emphasis added. It also appeared in Article 47 of the original version of this law in 1992.

14 Palmer M, 'The Re-Emergence of Family Law in Post-Mao China: Marriage, Divorce and Reproduction' (1995) 141 *The China Quarterly* 110-134, 133. See also, Chapter 5.

15 See above, footnote 13, Article 23.

16 *Ibid*, Article 26.

rather than a woman, a mother rather than an unmarried young woman and probably, following the recently promulgation of the two-child law, a mother with two kids over a mother with only one.<sup>17</sup> The Catch-22 that demands women to be both a good employee and a good mother is evident here.<sup>18</sup>

Other gendered aspects of parenthood will be discussed in Sections 4.4 and 4.5 on same-sex-oriented peoples' parenting experiences in cooperative or and mixed-orientation marriages. The pressure on same-sex-oriented people to have children is exacerbated by the limited routes to lawful parenthood in China, as shown in the following laws.

#### 4.2 CHINESE LAWS ON PARENTHOOD

The Family Law 1, 2, 3, and 4 in relation to parenthood in China are saturated with heteronormative assumptions, which directly or implicitly disadvantage same-sex-oriented people. First and foremost, legal marriage is open to different-sex couples only, and it is commonly held that the best environment for child-bearing and rearing is provided by a legally married man and woman.<sup>19</sup> Although children of single parents, adopted and out-of-wedlock children are legally recognized,<sup>20</sup> dual-parenthood based on formal, different-sex marriage still occupies a legally and culturally superior position. This section examines the most important Chinese legislation covering parenting issues, including the 'birth permit', parental status, parental authority, adoption, fostering, and assisted reproductive technology. It explains how the rights and privileges in written laws valorize different-sex married couples as best parents, and in contrast, how the various lawful routes to parenthood are made inaccessible or much costlier for the unmarried, whether straight or gay, couples or individuals.

17 See e.g., Shi Jing, 'Chinese Women Face Severe Job Competition after Implementation of Two-Child Policy', *People's Daily Online*, 10 August 2016, at [www.webcitation.org/6qWi07SY2](http://www.webcitation.org/6qWi07SY2).

18 For more discussions of the Catch-22, see Section 3.3.3.

19 For a detailed account of such common-sense assumption, see Victoria Clarke, 'What about the Children? Arguments against Lesbian and Gay Parenting' (2001) 24 *Women's Studies International Forum* 5, 555-570. To date there is no thorough research on same-sex parenting in China. For the social stigma and pressure on Chinese single parents, see Chau-Kiu Cheung and Elaine Suk-Ching Liu, 'Impacts of Social Pressure and Social Support on Distress Among Single Parents in China' (1997) 26 *Journal of Divorce and Remarriage* 3-4, 65-82.

20 Adoption Law of the People's Republic of China (hereinafter 'Adoption Law'), adopted 29 December 1991, revised 4 November 1998, effective 1 April 1999, Article 9; Marriage Law, Article 25.

### 4.2.1 Birth Permit

In mainland China, because of the official Family Planning Policies,<sup>21</sup> only legally married couples can get a 'family planning service certificate',<sup>22</sup> what people call a 'birth permit'. Only with this certificate can a child legally be delivered and registered as a lawful resident of the municipal or village. It is also the prerequisite for claiming maternity subsidies and social insurance. Married couples who give birth to more children than permitted by law,<sup>23</sup> single mothers and unmarried couples, are all charged administrative fines termed 'social upbringing fees', the amount of which can vary according to local bylaws.<sup>24</sup>

The strict and cumbersome procedures and substantial requirements have created huge barriers for same-sex-oriented people who want to give birth without getting married heterosexually. Spade has argued in a US context that administrative and bureaucratic rules can be as powerful, if not more so, as primary legislation in the regulation of population, especially the sexually peripheral.<sup>25</sup> The same can be said about the birth permit in China, which is a regularizing mechanism that controls the number of children in each household, influences the parents' marital decisions, and above all, produces legitimate families and their others. The obstacles it creates for same-sex-oriented people will be elaborated upon in Section 4.3.

### 4.2.2 Parental Status

According to the Chinese Marriage Law, parental status can be established via the biological mother's act of giving-birth, the assumption of a father's paternity within marriage and adoption. The rights of these children,

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21 See Section 4.1.

22 There is no national legislation on this certificate. The criteria and procedures to secure this permit are stipulated in the local bylaws, which vary from city to city. For instance, according to the Measures of Guangzhou Municipality for the Administration of Population and Family Planning, adopted 15 April 2013, effective 1 August 2013, Article 37: 'Married women of the local residence permit should obtain the certificate of family planning from the office of population and family planning of the local government or of the neighborhood service center.' The Measures itself does not make it clear the specific procedures, but respondents have complained that this certificate requires more than ten stamps from different authorities.

23 Before 2016, in some rural areas, a second child was allowed if the first child is a girl, and some cities had issued provisional two-child policies for some married couples if one spouse is a single child of his or her original family; and since 2016, the universal two-child policy entered into force, allowing all married couple to have two children. See above, footnote 5.

24 Article 41 of the 2001 version of the Population and Family Planning Law, adopted 29 December 2001, effective 1 September 2002. See also, Sara L Friedman, 'The Intimacy of State Power: Marriage, Liberation, and Socialist Subjects in Southeastern China' (2005) 32 *American Ethnologist* 2, 312-327.

25 Dean Spade, 'Laws as Tactics' (2011) 21 *Columbia Journal of Gender and Law* 442-473.

whether legitimate or not, biological or not, are all equal.<sup>26</sup> Step parents, if having established a substantial supporting relationship with the minor step children, can assume the same rights and obligations as birth parents,<sup>27</sup> but do not have parental status unless going through formal procedures of adoption.<sup>28</sup>

There is no provision on the assumption of paternity in statutory law. However, the Supreme People's Court issued an interpretation in 1956, regarding a case where the wife had committed adultery and the husband sued for a divorce and denied his paternity.<sup>29</sup> The Court maintained that since the child was born while the marriage was legally in force, and since the husband could not provide evidence to prove otherwise, he should assume paternity.<sup>30</sup> This judicial interpretation has since then been referred to as the law on assumption of paternity.<sup>31</sup>

Nevertheless, this assumption only exists within marriage. There is no legal provision or judicial interpretation on the assumption of paternity for children born in cohabiting different-sex relationships. Children born in single-mother families usually have no legal father on their household registration certificate (*hukou*).<sup>32</sup> For same-sex couples, the partner of the child's biological or adoptive parent cannot automatically become the legal parent of the child, nor is there any procedure that can give legal status to the *de facto* mothers or fathers.

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26 See Marriage Law, Article 25: 'A natural child shall have the equal rights of a legitimate child, and shall not be harmed or discriminated against by any person. The natural father or mother that does not directly bring up his or her natural child shall undertake the expenses for the living and education of the natural child until the child is able to live an independent life.' Article 26 stipulates, 'The state defends lawful adoptions. The relevant provisions in this law concerning the relationship between parents and children shall be applicable to foster parents and foster children.'

27 Article 27: 'The step parent and the step child shall not maltreat or discriminate against one another. The relevant rights and obligations in this law concerning the relationship between parents and children shall be applicable to step parents and the step children *under their care and education* (emphasis added).'

28 See Adoption Law, Article 14: 'A step-father or step-mother may, with the consent of the father or mother of a child, adopt the child as his or her step-son or step-daughter'.

29 Reply of the Supreme People's Court on how to decide the legal father of the child of Xu Xiumei (最高人民法院关于徐秀梅所生的小孩应如何断定生父问题的复函) 25 September 1956, No. 9555.

30 Ibid.

31 For more scholarly discussion on the paternal assumption in marriage, see Yao-dong Liu, 'Research on the Legitimation and Legitimization of Illegitimate Children' (2013) 27 *Journal of Shihezi University (Philosophy and Social Science)* 3, 59-67; Xiu-lan Luo and Jun Hu, 'On Establishing the System of Presuming the Children Born in Wedlock in Our Country: The Additional Thought about the Revising of the Marriage Law' (2001) 22 *Journal of Chenzhou Teachers College* 6, 25-28.

32 There is no nation-wide rule on single-motherhood and children's *hukou*, and it is difficult to find written local bylaws in this regard. The information is obtained from a respondent who is a lesbian single mother.

### 4.2.3 Guardianship

In Chinese law, parental authority and responsibility are stipulated in the rules on guardianship. The duties of a guardian are to

‘protect the person, property and other lawful rights and interests of his wards...A guardian’s rights to fulfil his guardianship in accordance with the law shall be protected by law...If a guardian does not fulfil his duties as guardian or infringes upon the lawful rights and interests of his ward, he shall be held responsible; if a guardian causes any property loss for his ward, he shall compensate for such loss. The people’s court may disqualify a guardian based on the application of a concerned party or unit.’<sup>33</sup>

Guardianship is primarily established by natural, adoptive and step parenthood.<sup>34</sup> However, this does not theoretically exclude an unmarried different-sex or even same-sex partner to become a guardian of the other person’s child, because

‘...[i]f the parents of a minor are dead or lack the competence to be his guardian, a person from the following categories who has the competence to be a guardian shall act as his guardian: (1) paternal or maternal grandparent; (2) elder brother or sister; or (3) *any other closely connected relative or friend willing to bear the responsibility of guardianship* and having approval from the units of the minor’s parents or from the neighborhood or village committee in the place of the minor’s residence...’<sup>35</sup>

Although grandparents and siblings are prioritized when the parents are not able to exercise guardianship, legally there is some latitude for an unmarried partner to take authority and responsibility as a ‘closely connected friend’. However, this provision would seem insufficient to protect the relationship established between a *de facto* co-parent and a child against a possible guardianship claim by an emotionally aloof grandparent or sibling.

### 4.2.4 Adoption

According to the Chinese Adoption Law, only different-sex married couples are allowed to adopt a child jointly.<sup>36</sup> Step-parent adoption is only valid within different-sex marriages.<sup>37</sup> A same-sex partner can only become an adoptive parent of his or her partner’s child when that partner relinquishes

33 Article 18, General Principles of the Civil Law of the People’s Republic of China, adopted 12 April 1986, revised 27 August 2009, hereinafter ‘General Principles of the Civil Law’.

34 Ibid, Article 16 (1): ‘The parents of a minor shall be his guardians.’

35 Ibid, Article 16 (2), emphasis added.

36 Article 10 (2) of the Adoption Law obliges joint adoption for married persons: ‘Where a person with spouse adopts a child, the husband and wife must adopt the child in concert.’

37 Marriage Law, Article 27; Adoption Law, Article 14.

his or her own parental status,<sup>38</sup> but this is not a legal situation that most same-sex couples want to find themselves in. While in many countries same-sex couples can secure second-parent adoption via a court order,<sup>39</sup> this route is not available in China.<sup>40</sup> Adopting one's same-sex partner as an adult child to establish legal kinship is not possible, either.<sup>41</sup>

Single-parent adoption is one of the few situations where biology and marriage are less salient in establishing parenthood. Chinese Adoption Law does allow unmarried people to become an adoptive parents,<sup>42</sup> provided that there is a 40-year age gap where a man adopts a female child.<sup>43</sup> Although single-parent adoption is lawful, in practice the decision makers still prioritize married couples. According to Lumin, a closeted lesbian employee of a state-owned orphanage, they would first evaluate the 'completeness and healthiness' of a family, which is mainly based on the length and the stability of the marriage.<sup>44</sup> There is no formal or written rule covering the issue, said Lumin, but senior figures simply require their staff to put unmarried applicants on the waiting list.<sup>45</sup> I was unable to examine how prevalent this unwritten rule is in other places, but it would not be surprising if such unspoken discrimination were found elsewhere.

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38 Adoption Law, Article 22 (2).

39 See Natalie Nikolina, 'Chapter 5 Evolution of parenting rights in Europe', in Kees Waaldijk (ed), 'More and More Together: Legal Family Formats for Same-Sex and Different-Sex Couples in European Countries: Comparative Analysis of Data in the LawsAndFamilies Database' (2017) 75 *Families and Societies Working Paper Series*, 101-113, 104. See also, Yuval Merin, *Equality for Same-Sex Couples: The Legal Recognition of Gay Partnerships in Europe and the United States* (University of Chicago Press, Chicago and London, 2002), 181-185.

40 In China, adoption is not granted by a court order. It only requires a notarized contract and certain registration procedures at the local department of civil affairs. See Measures for Registration of Adoption of Children by Chinese Citizens (中国公民收养子女登记办法), issued 25 May 1999, effective 25 May 1999.

41 This is a practice between same-sex partners to secure their family rights in some countries, see e.g., *In re Adult Anonymous II*, United States, 452 N.Y.S.2d 198, 201 (App. Div., 1982) (approving same-sex adult adoption petition). See also, Merin, *Equality for Same-Sex Couples* 196; Claire Maree, 'Same-Sex Partnerships in Japan: Bypasses and Other Alternatives' (2004) 33 *Women's Studies* 4, 541-549.

42 There is no explicit prohibition on single-parent adoption by a homosexual individual, yet Article 2 of Adoption Law provides that 'adoption... shall not violate social ethics', which could probably be used to reject applicants who are openly homosexual.

43 Article 9, Adoption Law. This provision is based on heteronormative morality, which tries to prevent younger male adult from taking advantages of the adoptive girl. This assumption turns a blind eye to the sexual abuse that can happen between the adoptive parent and child of any gender and age gap.

44 See comparatively, *EB. v France*, Application No. 43546/02, 1 FLR 850, ECtHR (2008), where the European Court of Human Rights found it discriminatory to reject the lesbian woman's application for adoption on the ground of her 'lifestyle', which implies her sexual orientation.

45 Interview on 16 August 2014.

While the Adoption Law is not explicitly discriminatory on the ground of sexual orientation, references to marriage aside, the China Center for Child Welfare and Adoption (CCCWA), a semi-governmental organization responsible for the adoption of Chinese children by Chinese nationals or foreigners, has made it explicit that foreign homosexual individuals or couples cannot adopt Chinese children. In addition to the requirements of marriage, age, health and financial status for the prospective adoptive parents,<sup>46</sup> under the question ‘Can homosexuals adopt children in China?’ in the section on international adoption, it states:

‘The CCCWA does not provide adoptees to homosexuals. Legally speaking, Chinese Marriage Law only recognizes families established by different-sex marriage, and does not legalize same-sex family. From the perspective of Chinese medical science (*zhongguo yixue*), homosexuality belongs to sexual orientation disorder, which is a mental disease under the category of psychosexual disorders. According to Chinese traditional ethics and customs, homosexuality contravenes public mores, and is not accepted by the society. Therefore, according to the principle of public morality in Adoption Law, foreign homosexuals are not allowed to adopt children in China.’<sup>47</sup>

In March 2016, it was reported that a lesbian from the United States intended to adopt a Chinese child with special needs, but was rejected in line with the above-mentioned rule.<sup>48</sup> Actually, two years before that, an activist Ah-Qiang<sup>49</sup> had called the center and asked them to withdraw this discriminatory rule. The center replied that they would delete this page in their new website.<sup>50</sup> To date, however, the above question and its answer are still accessible.

The center’s answer illustrates the complementary nature of legal, medical and moral arguments in justifying exclusion. The incomplete de-pathologization of homosexuality in the 2001 Chinese Classification of Mental Disorder III (CCMD-3)<sup>51</sup> provides an authoritative basis for the center on which to openly discriminate against (foreign) homosexuals. In this context, ‘China’ is purposefully essentialized and de-historicized so that it is presented as a culture that is incompatible with homosexuality, notwith-

46 See ‘Who Can Adopt’ section in Intercountry Adoption, U.S. Department of State, at [www.webcitation.org/6ocCOZDeI](http://www.webcitation.org/6ocCOZDeI); see also the changes that take effective since 1 January 2015 that opens up the eligibility of single foreign females to adopt in China [www.webcitation.org/6ocDdsde1](http://www.webcitation.org/6ocDdsde1).

47 See ‘Can Homosexuals Adopt Children from China?’ CCCWA, 24 March 2011, at [www.webcitation.org/6fIKkwMTG](http://www.webcitation.org/6fIKkwMTG).

48 Melissa Castro Wyatt, ‘I Bumped into My Fate, and Against China’s Adoption Rules’, *the Washington Post*, 7 March 2016, at [www.webcitation.org/6ocDmhVGb](http://www.webcitation.org/6ocDmhVGb).

49 Ah-Qiang is the executive director of PFLAG China, and this is the name he uses in his activist life.

50 Interview with Ah-Qiang, 26 September 2014.

51 For more discussion about the activism toward destigmatization and full depathologization of homosexuality, see Section 6.3.1.

standing rich historical studies suggesting otherwise.<sup>52</sup> Interestingly, the CCMD-3, which is similar in structure and categorization to the ICD<sup>53</sup> and DSM<sup>54</sup>, the two best-known diagnostic manuals based on modern Western medical science, was in this context referred to as a 'Chinese' standard.

*De facto* adoption used to be an option in China, but was repealed because it was considered as failing to meet the formality of the rule-of-law and as bad for cultivating people's 'legal consciousness'.<sup>55</sup> Before that, instead of adopting a completely unknown child via legal procedures, a more prevalent practice among Chinese people, especially in rural areas, has been *guoji* (informally adopt within an extended family). *Guoji* usually occurs when a (different-sex) couple fail to give birth to a son. The siblings or cousins of this couple might then let them adopt one of their sons, so that their relative's family line can be continued.

In rural areas, *guoji* has been practiced for centuries without state intervention, so today there are still many *guoji* relationships that do not fit into the legal categories of either adoption or fostering. Although this traditional practice was criticized as a 'corrupted feudal remnant' in Communist China, it was not directly prohibited by law.<sup>56</sup> According to a judicial interpretation of the Supreme People's Court in 1984, if the *guoji* child and the *guoji* parents have established a 'caretaking relationship', then the child shall be deemed as lawfully adopted and shall have the right to inherit; if *guoji* is merely conducted as a feudal ritual, the child should not enjoy this right.<sup>57</sup> In addition to inheritance, court cases also show that *guoji* children that can demonstrate a caring relationship between them and their adoptive parents, have the right to claim damages from a third party who is legally at fault with regard to on their *guoji* parents.<sup>58</sup> Where *guoji* relationships are deemed substantial, other rights and obligations that apply to biological or formally adoptive families should be binding too. More stories relating to *guoji* will be presented in Section 4.3.3.

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52 See e.g., Wenqing Kang, 'Male Same-Sex Relations in Modern China: Language, Media Representation, and Law, 1900- 1949' (2010) 18 *Positions: East Asia Cultures Critique* 2, 489-510; Tze-Lan D Sang, *The Emerging Lesbian: Female Same-Sex Desire in Modern China* (University of Chicago Press, Chicago and London, 2003).

53 The International Statistical Classification of Diseases and Related Health Problems is maintained by the World Health Organization.

54 The Diagnostic and Statistical Manual of Mental Disorders is published by the American Psychiatric Association.

55 For the party-state's use of the term 'legal consciousness' in China, see Section 1.3.

56 Article 38, Supreme People's Courts Opinions on Several Problems in Implementing Civil Policies and Laws (最高人民法院关于贯彻执行民事政策法律若干问题的意见), issued 30 August 1984, effective 30 August 1984.

57 Ibid.

58 See e.g., *Case concerning a car accident between X insurance company and Peng*, Judgment, Guangxi Yulin Intermediate People's Court, no. 219. 19 November 2012, where the *guoji* children were granted the legal standings to claim compensation against a faulty third party.

#### 4.2.5 Fostering

The administrative law on family foster care does not render it black-and-white that the fostering family must consist of a husband and a wife, nor does it expressly exclude unmarried couples or individuals from becoming foster parents.<sup>59</sup> However, the bylaws in many municipalities do not allow single parents to foster. Beijing, for instance, rejects single-parent fostering in principle.<sup>60</sup> Nanjing in Jiangsu Province also emphasizes the ‘harmony’ of the fostering family, including the requirements that ‘the main caretaker should not have had more than two divorces, and the current marriage must have lasted for at least two years’.<sup>61</sup> The rules on fostering are also related to China’s residence permit system (*hukou*). For instance, migrants living in Guangzhou without local *hukou* are unable to become foster parents.<sup>62</sup>

Zhongshan, a city in Guangdong Province, seems to be more lenient in this respect. It allows an unmarried individual to become a foster parent. According to the Secretary of the Zhongshan Children’s Welfare Agency, a fostering family is not limited to ‘complete families’ in a conventional sense, so long as it meets the criteria of ‘being appropriate for children to live therein’, ‘having a local residence permit’ etc.; unmarried men between 40 and 50 years old and unmarried women between 30 and 50 can also become foster parents.<sup>63</sup> This seems to provide an opening for same-sex-oriented residents in Zhongshan to become foster parents. Since no one has reportedly tested the water there, it is so far unclear whether an openly same-sex-oriented person could become a foster parent. It is also unknown if same-sex cohabiting couples, as ‘non-conventional’ families, could jointly foster a child in the city.

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59 Measures for the Administration of Family Foster Care (家庭寄养管理办法), issued by the Ministry of Civil Affairs on 24 Sept 2014, effective 1 December 2014.

60 See Notice of Beijing Bureau of Civil Affairs on Implementing the Measures for Family Foster Care (北京市民政局关于贯彻落实民政部《家庭寄养管理办法》的通知), issued and effective 2 December 2015.

61 ‘Nanjing City Promulgated the Criteria of Foster Family for Children in Distress (南京出台困境未成年人寄养家庭评估标准)’, *Renmin Wang*, 6 July 2015, at [www.webcitation.org/6exxHMTsH](http://www.webcitation.org/6exxHMTsH).

62 Temporary Measures of the Regulation of Fostering Families in Guangzhou (广州家庭寄养管理暂行办法), issued 30 October 2003, effective 1 January 2004, Article 9 (1) stipulates that the fostering family should have permanent residence permit in this city, and should have stable property for living.

63 There is no official website for the Welfare Agency, and the information is obtained from an interview of its Secretary by the local news agency in 2010, see ‘200 Children Waiting to be Fostered in the Welfare Home in Our City (市福利院200孩子待寄养)’, *Zhongshan Daily*, 29 December 2010, at [www.webcitation.org/6fC9YnoMI](http://www.webcitation.org/6fC9YnoMI).

#### 4.2.6 Assisted Reproductive Technology

Assisted Reproductive Technology (ART) refers to the technology used to bring about pregnancy in procedures, including fertility medication, intra-uterine insemination (IUI)<sup>64</sup> and in vitro fertilization and embryo transfer (IVF-ET), etcetera.<sup>65</sup> Most countries tend to be reluctant to grant people access to ART outside different-sex marriage.<sup>66</sup>

In China, surrogacy is entirely prohibited,<sup>67</sup> regardless of marital or health status. As to IUI and IVF-ET, it is made clear that they should not violate the Family Planning Policy,<sup>68</sup> which means single women, same-sex couples and unmarried different-sex couples are all denied legal access to such reproductive technology. However, a bylaw of Jilin Province enacted in 2002 permits unmarried women to become parents via ART:

‘women who are above the lawful marriageable age (20 years old), who decide not to marry later and who do not have any children, may give birth to a child by means of medically assisted reproductive technologies’.<sup>69</sup>

What is unclear is whether women who do so still have to pay ‘social upbringing fees’ for a child born out-of-wedlock,<sup>70</sup> and what the legal consequences would be if they later changed their minds, got married, and wanted to have another biological child with their husbands.<sup>71</sup> Although

64 In this paper, IUI refers to the method that a woman gets pregnant without intercourse, but by placing sperm inside her uterus to facilitate fertilization, with no need to stimulate her ovulatory process and remove ova. IUI can be carried out either in hospital or at home using a syringe.

65 For an overview of ART and same-sex parenting, see John A Robertson, ‘Gay and Lesbian Access to Assisted Reproductive Technology’ (2004) 55 *Case Western Reserve Law Review* 2, 323-372; DeLair Catherine, ‘Ethical, Moral, Economic and Legal Barriers to Assisted Reproductive Technologies Employed by Gay Men and Lesbian Women’ (2000) 4 *DePaul Journal of Health Care Law* 147-191.

66 For more discussion on the restriction of unmarried women, either straight or lesbian, to receive ART in other countries, see Kees Waaldijk (ed), ‘More and More Together’ (2017), 34-35; Bambi ES Robinson, ‘Birds Do It. Bees Do It. So Why Not Single Women and Lesbians?’ (1997) 11 *Bioethics* 3-4, 217-227; Julien S Murphy, ‘Should Lesbians Count as Infertile Couples? Anti-Lesbian Discrimination in Assisted Reproduction’ in Mary Bernstein and Renate Reimann (eds) *Queer Families, Queer Politics: Challenging Culture and State* (Columbia University Press, New York, 2001) 182-200.

67 Article 3, Measures on Administration of Assisted Human Reproduction Technology (人类辅助生殖技术管理办法) issued by the Department of Health on 20 February 2001, effective 1 August 2001.

68 Ibid.

69 Regulations of Jilin Province on Population and Family Planning, adopted 27 September 2002, effective 1 November 2002, Article 30(2).

70 Ibid, Article 67, which provides that those who give birth to a child without going through the formalities of marriage registrations shall pay the social upbringing charges of 4 to 7 times the disposable income per capita of last year.

71 This one-child dilemma can be resolved after the promulgation of the universal two-child policy.

the law in Jilin has been in force for more than a decade, there are no reports of an unmarried straight or lesbian woman using ART to conceive a child in a hospital in the province.

The validity of the Jilin law became even more questionable, when the central government's Department of Health published a contradictory regulation in 2003. Under this, unmarried women are explicitly prohibited from using ART.<sup>72</sup> No binding interpretation has been made as to whether Jilin Province should follow its own local regulation or the central one.<sup>73</sup> In recent years, the debate on unmarried women's reproductive rights has re-emerged, after a number of female celebrities chose to freeze their ova abroad.<sup>74</sup> Such technology is unavailable legally in China. The authorities have not responded to the discussion, but it's likely it will get more attention in China as demand for it rises.

The lack of recognition for non-marital parenthood also puts unmarried individuals or couples at a financial disadvantage. In addition to 'social upbringing fees' and other grey-area costs, in many bylaws on maternal insurance, it is stated policy that medical expenses caused resulting from pregnancy and childbirth, beyond those allowed by national or local family planning policies, will not be covered, whether via ART or conventional routes to biological parenthood.<sup>75</sup> This is another factor that pushes people who want to have kids into marriage.

#### 4.2.7 Summary

To sum up this section, parental rights in China mostly pivot around different-sex marriage, especially when it comes to gaining a birth permit, affirming paternity and accessing assisted reproductive technologies. We have also seen that administrative procedures and hidden rules that prioritize heteronormative marriages can be as powerful as formal law. However, there are several laws that acknowledge wider notions of kinship as well,

72 Ethical Principles on Human Assisted Reproductive Technology and Human Sperm Bank (人类辅助生殖技术和人类精子库伦理原则), issued 27 June 2003, effective 1 October 2003.

73 Article 86 (2) of the Law on Legislation stipulate, 'Where there is inconsistency between the provisions of local regulations and those of the rules of departments governing one and same matter and it is hard to decide which provisions shall prevail, the State Council shall make a decision; if it considers that the provisions of the local regulations should be applied, it shall decide that the provisions of the local regulations be applied in the locality concerned; if it considers that the rules of departments should be applied, the case shall be submitted to the Standing Committee of the National People's Congress for a ruling', issued 15 March 2000, effective 1 July 2000.

74 See Yao Yao and Yang Jie, 'Frozen Eggs Prompt Intense Online Debate by Celebrities', *the Telegram*, 13 August 2015, at [www.webcitation.org/6ezhn020u](http://www.webcitation.org/6ezhn020u).

75 See e.g., Provisions of Tianjin City on the Urban Employees' Maternity Insurance (天津市城镇职工生育保险规定), issued 16 August 2005, effective 1 September 2005. See also, 'A Single Woman Became A Mother via IVF for Her Elderly Care (单身女子怕老无所依人工授精当上妈妈)', *Yangzi Evening Paper*, 26 March 2014, at [www.webcitation.org/6fDL8TXyw](http://www.webcitation.org/6fDL8TXyw).

such as the ‘close friends’ provision for guardianship, the less rigid rules on fostering in Zhongshan city, and the opening up of ART to unmarried women in Jilin province. The constraints of the parenthood straightjacket and the small degree of freedom within it are together influencing same-sex-oriented people’s parenting decisions.

#### 4.3 SAME-SEX-ORIENTED PEOPLE BECOMING PARENTS OUTSIDE OF MARRIAGE

As explained above, unmarried same-sex-oriented couples, like all other unmarried people, are denied access to many of the routes to parenthood. However, the law’s discrimination does not diminish the desire of some same-sex-oriented people to become parents. This section does not aim to provide an exhaustive list of the ways same-sex-oriented individuals and couples in China become parents. It looks at three paths, namely IUI or IVF-ET, surrogacy, and *de facto* adoption, so as to illustrate how unmarried same-sex-oriented people manage to become parents against the prevailing odds. The respondents’ experiences also show how costly and risky it is to navigate the legally forbidden areas without a marriage certificate.

##### 4.3.1 Becoming Lesbian Mothers via IUI or IVF-ET

Although the laws and regulations on family planning and ART only allow different-sex married couples access to such technologies, there is no law explicitly punishing individuals who conduct IUI outside a hospital using privately donated sperms except for the social upbringing fees for the ‘unplanned’ child and the unreimbursed medical cost.<sup>76</sup> According to the information shared amongst some lesbian mothers, there are many online sperm donation groups.<sup>77</sup> However, such underground donation is rather risky, because the health status of the donor is unknown, and issues concerning privacy and money have the potential to lead to disputes between donors and mothers where there was no trusting relationship beforehand.

Still, using sperm from a well-known male friend is not everyone’s preferred option. Mumu, a self-identified butch lesbian who wants to get pregnant and raise the baby with her same-sex partner, insisted on using sperm from an unknown donor. Unlike a lawyer, who might think first about the legal disadvantages of having known donors, Mumu’s major concern was the potential drama that becoming emotionally attached to the biological father might cause:

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76 See above, footnote 67.

77 See e.g., discussion in a weblog: Zimo Jihao, ‘Successful Lesbian IVF Experience: My Wife is Four-Month Pregnant’ (拉拉成功的人工受孕, 媳妇已怀孕四个月了), *Tianya BBS*, 25 November 2013, [www.webcitation.org/6f14d9MB6](http://www.webcitation.org/6f14d9MB6).

'Haven't you heard of those terrible anecdotes that some lesbian couples broke up because one of them fell in love with and married the biological father of her child? I'd rather block this possibility from the very beginning so that my partner won't feel insecure.'

At first sight, legal concerns seem to be less salient for Mumu than worries about jealousy in relationships. However, behind her lack of interest in the legal consequences of finding known donors lie insecurities experienced by many lesbians: on the one hand, they are living a challenging life in a legally and socially unrecognized same-sex partnership, and on the other, they are constantly tempted by a decent and legally protected different-sex marriage. The anecdotes that contribute to her worries are not surprising: after all, for a mother, the prospect of being part of a 'normal' family can be seductive, especially given that her children would be less likely to face discrimination at school or in society if they had a mother and a father.<sup>78</sup> Therefore, Mumu's pre-emptive move to avoid any possibility that she might be tempted into marrying the biological father can be read as her way of expressing commitment to her partner and to lesbian co-parenthood.

There are very few 'LaMas' (lesbian mothers) who have come out with their parenting experiences, but as the number of lesbian intended parents increases, LaMa communities have begun to form. As a researcher, I joined a WeChat group called 'Be LaMa, Be Papa', where LaMas share their experiences and answer questions raised by new comers. Many of them have become self-taught experts on the medical, legal and financial issues concerning IUI, IVF-ET, and gestational surrogacy.

I talked to a then 33-year-old lesbian called Green, among several other group members, who illustrated the importance of social connections in circumventing a hostile legal environment. Green and her partner White came out to their parents five years previously. When they were financially and mentally ready to become parents, all four parents keenly supported them. By the time I interviewed Green, White was already pregnant, using Green's ova and a 'half-anonymous' donor's sperm. By 'half-anonymous' sperm donor, Green meant that they found a middle ground between known and unknown donation:

I have a straight male friend, C, who made friends with an open-minded doctor. That was how we connected to the doctor who agreed to do the surgery for us. The donor is also a friend of C's. We all came to consensus that we should not meet up, so as to prevent unnecessary disputes. We don't even know each other's phone number. We did not have any legal agreements, since White and I would never cast greedy eyes on the donor's property. In the whole process, we communicated through C as a middleman.'

78 The impact of the lack of institutional recognition and support on the failure of same-sex relationships to endure has been discussed in Ellen DB Riggie, Sharon S Rostosky and Robert A Prather, 'Advance Planning by Same-Sex Couples.' (2006) 27 *Journal of Family Issues* 6, 758-776; Kristin P Beals, Emily A Impett and Letitia Anne Peplau, 'Lesbians in Love: Why Some Relationships Endure and Others End' (2002) 6 *Journal of Lesbian Studies* 1, 53-63. There is no qualitative or quantitative research on the reasons for same-sex separation in China yet.

To my surprise, unlike most other Chinese lesbian couples who went through the procedures abroad, they successfully underwent IVF and gestational surrogacy in a Chinese hospital. Describing their experiences Green kept parodying a Communist Party propaganda phrase:

‘This is what I call “Chinese characteristics” of lesbian parenting: in this bizarre (*qipa*) country, it appears that you can do nothing, but in fact you can do anything! The law is not sophisticated, so in many areas, the local policies, the personal connection, and “the doctrine of golden mean” all play important roles.

...We started to play with the “Chinese characteristics” since we decided to start a family. The doctor knew that we were lesbians and was willing to help. Of course, our gifts and “red envelopes” (gift money) are also crucial in maintaining good doctor-patient relationship. That’s why he did not ask us to provide marriage certificate or any other permits.’

The IVF procedures were also conducted at the periphery of breaking the state law:

‘On the day of the procedure, the sperm donor produced semen in a hotel nearby, and C brought the container to the hospital, without letting us meet one another. Actually a lot of sperm collection in China is done in this way, because it is illegal for unauthorized hospitals to have a sperm bank.

In addition to the doctor I just mentioned, other relevant people were also “taken good care of” (*dadian haole*). We didn’t come out [to them], and they simply treated me as an “infertile patient” and my partner as an altruistic friend for gestational surrogacy. My “husband” did not show up because we said, “he happened to be busy with his work that day”.’

It is very likely that all the doctors and nurses knew that doing IVF for an unmarried woman, using sperm other than from an official sperm bank, and transferring the embryo to another unmarried woman’s uterus are illegal in China, but as Green kept emphasizing, ‘the Chinese characteristics just worked.’

What Green refers to as ‘Chinese characteristics’ are noteworthy. For her, the most powerful tool that can counterbalance her disadvantages as an unmarried woman is probably *guanxi*, or social connection. *Guanxi* is better understood not as a polar opposite to or substitute for China’s formal rules and institutions; rather, they are complementary.<sup>79</sup> If the compliance with the law depends on the extent to which the law responds to social needs,<sup>80</sup> then people’s resorting to *guanxi* and avoiding the law in certain contexts is a sign of the law’s failure to address their legitimate needs. Green’s case is an apt example of this correlation: as the law on IVF-ET excludes the unmarried, this lesbian couple and the doctors had to covertly break the law. The *guanxi* between them played an important role in such collabora-

79 Pitman B Potter, ‘Guanxi and the PRC Legal System: From Contradiction to Complementarity’ in Thomas Gold, Doug Guthrie and David Wank (eds), *Social Connections in China: Institutions, Culture, and the Changing Nature of Guanxi* (Cambridge University Press 2002) 179-196.

80 Ibid.

tive non-compliance, which is built partly on, but not limited to, gift-giving, compassion, mutual trust and antipathy towards discriminatory laws. For Green and White, such bond is an indispensable asset, an extra-legal resource that justifies and prompts their goal of child-bearing, despite the illegal nature of their actions from a strictly legal perspective.

Green emphasized that her case was very special and should not be taken as representing other lesbians. Indeed, their ability to pay red-envelope money suggests that they're more economically privileged than many same-sex couples, more so even than some heterosexual married couples who enjoy more legal privileges but who are economically precarious. Moreover, the hospital and doctors that helped them may not dare to break the law all the time, so there was an element of luck as well.

The contingency aside, however, the phenomenon of surfing the grey areas is not exceptional. In fact, the tactic of using social connections to wriggle free from the legal straightjacket of parenthood is not an essentially 'Chinese' one. If we see law as 'a technical instrument used to pursue advantages – one used most effectively by those with other resources',<sup>81</sup> then it is unsurprising that various against-the-law practices can be found within the experience of same-sex (intended) parents in other cultures as well. For instance, lesbian and gay parents in the legally-less-friendly jurisdictions in the United States also find their social networks particularly important; tacit transgression of the law is also seen there.<sup>82</sup> Comparing experiences from different countries alongside one another can help us challenge the false dichotomy of European and American rule-of-law versus China's lack thereof. This point will be revisited in Chapter 7.

#### 4.3.2 Becoming Gay Fathers via Surrogacy

For financially-able gay Chinese men, transnational surrogacy is an increasingly realistic route to parenthood. Until a few years ago, the only well-known gay family with children via surrogacy was that of a well-off gay couple, Li and Ruan.<sup>83</sup> They moved to the United States and became the epitome of the 'American dream': Each of them has secured tenure in a medical school, and each has had twins via surrogacy.<sup>84</sup>

Li and Ruan are often lauded as role models for Chinese gay men. However, as I observed in the 2014 PFLAG annual meeting, some less wealthy gay people and their parents have expressed an even greater sense of pessimism after hearing their stories, because for them such a route would

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81 Marc Galanter, 'Law Abounding: Legalisation around the North Atlantic' (1992) 55 *The Modern Law Review* 1, 1-24, 23.

82 Amanda K Baumle and D'Lane R Compton, *Legalizing LGBT Families: How the Law Shapes Parenthood* (New York University Press, New York and London, 2015) 190.

83 Their names are used as they appear in media.

84 Li and Ruan's life stories can be found on their Sina Weibo account 'Family of Li and Ruan' (李阮一家人), at [www.webcitation.org/6qwXavrX3](http://www.webcitation.org/6qwXavrX3).

be fantastical.<sup>85</sup> Indeed, Li and Ruan's 'success' was highly dependent on their educational background, English-language skills, financial privilege and global mobility, which might be a mission impossible for the average working-class gay man in mainland China. Moreover, according to the law in Maryland where they legally reside, gay couples can enter into domestic partnership or same-sex marriage, and surrogacy is formally recognized after going through a 'pre-birth order' process.<sup>86</sup> That means they also enjoy many more legal advantages than gay couples in China do.

Like the LaMa forums, there are also now a number of small online and offline groups for gay dads and intending ones. After attending one of Li and Ruan's story-sharing events, Wang Yu and Zhao Jun, the gay couple mentioned earlier in Section 4.1, decided to have children via surrogacy as well. They did thorough research online into the laws, technologies and costs of surrogacy in different countries, while also consulting Li and Ruan, family and immigration lawyers, as well as transnational surrogacy agencies. They finally chose Thailand, where commercial surrogacy for foreign intended gay parents was then lawful.<sup>87</sup> The price of the whole process in Thailand was less than one quarter of that in the US, which is nonetheless still unthinkable for Chinese working class.

Although they managed to have Zhao's surrogate biological child legally in Thailand, the law still created unexpected problems. Two of their main concerns were whether the baby girl could pass Immigration Checks and be safely brought back to China, and whether she could secure a household registration certificate (*hukou*) in China as she was born out of wedlock abroad. In the end, the two dads managed to take their daughter home, but to date she is not registered as a lawful resident yet, which may incur more inconvenience concerning health insurance and education in the future.

Notwithstanding the formal legal barriers, by dealing with authorities of all sorts, Wang and Zhao have acquired detailed knowledge about the pragmatic solutions of intercountry surrogacy, immigration, residence registration and forum-shopping. For instance, they now know that some airports have relatively more gay-friendly immigration-check personnel; they also know of some small hospitals in the suburban areas that are not strict about requiring a birth certificate and a *hukou* of the baby, so that they can go to these places should their child get sick.

The parents of Zhao Jun expressed a degree of unhappiness that surrogacy policies in China and Thailand make it much more difficult and expensive for their gay son to have a biological child. However, their wish

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85 Participant observation on 13 September 2014.

86 *In Re: Roberto D.B.* No. 110, Sept. Term, Court of Appeals of Maryland, United States (2007).

87 During the surrogate mother's pregnancy in late 2014, Thailand was just about to pass a law banning foreign same-sex couples taking surrogate children out of this country, after a Western Australian couple were accused of leaving a twin boy with his surrogate mother after they discovered he had Down syndrome. For more information about the law banning commercial surrogacy in 2014, see 'Thailand bans commercial surrogacy', *the Guardian*, 20 February 2015, at [www.webcitation.org/6YoMF4xY7](http://www.webcitation.org/6YoMF4xY7).

for the child to be legitimate and safe far outweighs their grudges against the law. As Zhao's mother told me, she would be more than willing to give red envelopes to officials whenever necessary, as long as it was for the good of her granddaughter.

Many gay couples seeking surrogacy share a similar mindset. They are less interested in making an outright challenge to the ban on surrogacy, than in finding the most feasible way to become parents soon, legally, or even illegally. Just like Baumle and Compton observed in their research on the legal consciousness of same-sex-oriented people in legally hostile states in the U.S., my gay respondents' feelings of injustice and the resentment they expressed to the current laws are often 'tempered by the desire to achieve their family goals'.<sup>88</sup> They are less ambitious for gay rights advocacy, because they are worried about the negative effects that a backlash might have on the peaceful upbringing of their children.<sup>89</sup>

Of course, these Chinese gay men's efforts to become parents before, with or against the law are only one of the numerous and interlinked facets of transnational surrogacy. Some feminists warn that new reproductive technologies do not automatically improve the status of women, and that biogenetic capitalism may even reinforce and intensify the existing patterns of discrimination and exploitation.<sup>90</sup> Unfortunately, I was not able to talk to the white ovum donor<sup>91</sup> or the surrogate mother of Zhao's child, nor could I see the extent to which Chinese gay men's pursuit of rights is (un)attentive to women's reproductive justice. Further research is needed in this regard.

#### 4.3.3 Guoji: Informal Intra-Family Adoption

Not every same-sex couple can afford transnational, high-technology surrogacy. Theoretically, it is possible for a same-sex-oriented person to adopt as an unmarried individual.<sup>92</sup> However, except for stories I heard in bars or parks that fall under the heading of urban legends, I have not come across any same-sex individuals who live with a formally adopted child, and there is no such demographic data, either. The words of one respondent, Haotian, who tried to have his own child in a cooperative marriage, may explain

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88 Baumle and Compton, *Legalizing LGBT Families* (2015) 18.

89 Ibid.

90 See e.g., Rosi Braidotti, *Nomadic Subjects: Embodiment and Sexual Difference in Contemporary Feminist Theory* (Columbia University Press, New York, 1994) 97. For a radical feminist stance against assisted reproduction, see Gena Corea, *The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Wombs* (Harper and Row, New York, 1986).

91 They chose a good-looking white woman as the ovum donor, because they, like many Chinese gay and lesbian intended parents, want to have a mixed-blood child via ART. In these cases, most donors are white. For the racial concerns in transnational surrogacy, see Fariyal Ross-Sheriff, 'Transnational Cross-Racial Surrogacy: Issues and Concerns' (2012) *27 Affilia: Journal of Women and Social Work* 125-128.

92 See above, footnotes 36-40 and accompanying text.

some people's reluctance to adopt. He said he was afraid that adopting a child might lead to rumors that he was infertile and impotent. He also firmly believed that an adopted child would not be '*qin* enough'. *Qin* in Chinese, much like 'kin' in English, has a double meaning – emotional attachment and genetic bond, which infers an interlinking of the psychological and the biological in a normative parent-child relationship.<sup>93</sup> The blood relation is one of the reasons why *guoji*, or *de facto* adoption within an extended family,<sup>94</sup> used to be commonplace in China.

An instance of a *guoji* story involving a gay couple has been told publicly. It was on a famous talk show, '*Lu Yu You Yue* (A Date with Lu Yu)'.<sup>95</sup> Both in their fifties, Lunzuo Li and his partner Jiazheng Ju<sup>96</sup> had been living together for 21 years when the interview was conducted in 2006 and, at that point, their son was 28 years old. Back in 1990, when the boy was 12, his biological father, Li's cousin, sent him to the couples' home at the suggestion of Li's father. From then on, the boy lived as the son of this gay couple, whom he calls '*baba* (father)' (his biologically-related uncle Li) and '*shushu* (uncle)' (Li's partner, Ju) respectively.

There are female same-sex cohabitants practicing *guoji*, too. Born in the 1940s and meeting in their twenties, my respondents Lao Feng and Lao Yang<sup>97</sup> have lived together ever since. Neither of them was ever married to a man and, influenced by the propaganda of the Maoist era, they were proud to work on their own farm and to be 'self-reliant' (*zi li geng sheng*). Yang earned the most among her siblings, so her family all counted on her, and never blamed her for not getting married. After all, in rural China, a woman's marrying into (and becoming part of) a new family often means a loss of labor for her biological one.<sup>98</sup> When Yang reached the age of thirty-five, rather than pressure Yang to marry and give birth, her mother called a family meeting, proposing the idea that her three sons discuss it amongst themselves and choose one of their children for Yang to adopt. Not only was there no feeling of ill will, her brothers actually competed to *guoji* to her a son of theirs, because they wanted the child to live in a relatively better-off household.

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93 Research has found that in general, adoption in China is not desirable due to the blood-related tradition and the preference for a healthy child. Tsorng-yeh Lee and Treu-yen Chu, 'The Chinese Experience of Male Infertility' (2001) 23 *Western Journal of Nursing Research* 714-725, 722.

94 See above, footnotes 56-58 and accompanying text.

95 See Lu Yu You Yue, 'A Same-Sex Couple of 21 Years', *Youtube*, at [www.webcitation.org/6r6oZwzQH](http://www.webcitation.org/6r6oZwzQH).

96 Their names are well known as such.

97 *Lao* means old in Chinese, and people only call very good friend in the same generation as *lao* plus their last names. Out of respect, young people usually do not call an old person *lao*, but I did so after we became close. More of their stories will be told in Section 5.3.1.

98 Philip CC Huang, 'The Modern Chinese Family: In Light of Economic and Legal History' (2011) 37 *Modern China* 5, 459-497, 486.

Nonetheless, Yang preferred to adopt a girl, partly because she believed that a girl would be easier to raise: ‘unlike a boy, a girl doesn’t need me to build her a house when she gets married’. Research has shown that, despite the general preference for male children in Chinese families, many people choose to adopt a girl because the costs of education and marriage are likely to be much lower than with a boy.<sup>99</sup> There is another benefit Yang did not mention but is now evident in her later years: a daughter is more likely to be considerate and provide emotional and practical care for her parents.<sup>100</sup>

Yang decided to adopt the five-year-old girl, Autumn, who is the daughter of her second younger brother’s. She told me that they went through the paperwork at the civil affairs office of the town, agreeing in writing that Yang should be fully in charge of the girl’s living expenses, education and marriage, while the birth parents should relinquish all legal rights and responsibilities. There was no statutory Adoption Law when they practiced *guoji* in the 1970s, and Lao Yang could not find the paper they signed, so I was unable to know which law they relied on, and what specific terms and conditions the agreement provided.

Living with them since then, Autumn called both Yang and Feng ‘aunty’, although one day she said to me over the Internet, ‘Thank you for treating my *two moms* so nicely’. With slim income, Autumn and her husband live thriftily to provide for their core family – they have a son in high school then. She also supports both her adoptive mothers and her birth parents out of gratefulness and filial piety, even though she is not legally responsible for taking care of the latter. Here the feature of *guoji* becomes distinct: it is a cultural practice, a doing of kinship that strengthens rather than severs the ties in the extended family.

However, the validity of *guoji* as intra-familial *de facto* adoption is now in question. One could argue that because the entire 1984 judicial interpretation is still valid today, and in the absence of any of its findings being explicitly annulled, the provision about *guoji* should still be in effect. However, it is also arguable that since the Adoption Law entered into force in 1992, the formal requirement to register an adoption has automatically invalidated the informal practice of *guoji*.<sup>101</sup> There are already places that take a strictly formalistic approach to law and that consequently do not recognize any *guoji* relationship established after 1992.<sup>102</sup> Other provinces have not yet issued any clear prohibition.

99 Weiguo Zhang, ‘Who Adopts Girls and Why? Domestic Adoption of Female Children in Contemporary Rural China’ (2006) 56 *The China Journal* 63, 74–82.

100 *Ibid.*, 75.

101 Article 15 requires that any adoption should be registered with the civil affairs department, which implicitly denied the legality of unregistered adoption.

102 See e.g. Opinions on Awarding the Families that Have Made Contributions to Family Planning in Fujian Province (福建省农村部分计划生育家庭贡献奖励制度实施意见), issued by Fujian Family Planning Commission and Bureau of Finance on 2007 February 12, effective 2007 February 12.

Therefore, same-sex individuals and couples who became parents via *guoji* have to deal with legal uncertainties. In the talk show mentioned earlier, we were not told whether Lunzuo Li, as a legally unmarried man, had gone through the procedures to formally adopt the boy. Even if he had not, such *guoji* parent-child relationship, once proved substantial rather than merely ritual, is still likely to be recognized by a court as having the same legal effects as formal adoption, since it happened before 1992. However, the other dad, Jiazheng Ju, is, from a legal standing, a stranger to Li's adoptive son. He and his 'son' may not make medical decisions for one another, nor be one another's statutory successor. Nor does Ju have any parental authority over or responsibility for him. The same goes to Lao Feng, the non-*guoji* mother of Autumn.

#### 4.3.4 Summary

In the shadow of the laws on parenthood that predominantly favor different-sex married couples, same-sex-oriented people have explored at least three routes to becoming parents in the absence of a marriage certificate. Sometimes they obey or use the law for practical reasons, such as when they try to obtain a legal *hukou* for a child because it facilitates going to school or hospital. At times, they would rather surf the legally grey areas and even carefully break the law, as shown in the cases of transnational surrogacy and undergoing IVF-ET as unmarried individuals in a Chinese hospital. Their experiences suggest that in spite of the formal, heteronormative legal system, people can find ways to survive in the periphery. Of course, such agency goes hand in hand with legal risks, financial costs and additional management of interpersonal relationships that could have been avoided were parenthood not bundled so tightly with different-sex marriage.

The high financial, intellectual, social and legal investments of becoming a parent outside marriage partly explains why many same-sex-oriented people are pushed and/or seduced into first getting married and then having children, the 'natural' path for most heterosexuals. Some same-sex-oriented people opt for becoming parents in a mixed-orientation marriage, and some in a gay-and-lesbian cooperative one. The former seems to be far more controversial. Moreover, wives in marriages of all sorts in China tend to feel that their role in child-bearing and rearing is undervalued. When an undervalued wife discovers the secret same-sex desires of the husband, it becomes a recipe for complaints, conflicts and, as we shall see, strongly expressed homophobia from society at large.

#### 4.4 BECOMING PARENTS IN A MIXED-ORIENTATION MARRIAGE

There can be a variety of reasons why many same-sex-oriented people get married and have children with an unwitting person of the different sex: some of them are hoping to 'cure' their homosexuality by using marriage

and parenthood as a form of ‘conversion therapy’; some are trying to make life easier by presenting themselves as a heterosexual *and* a parent – the latter often implies the former by default; some may have realized their same-sex attraction only after marriage; and some others are sexually more fluid yet do want to settle down in marriage and rear their offspring. However, when a same-sex-oriented man (whether gay, bisexual or without clear sexual identity) chooses to have children by marrying a (presumably straight<sup>103</sup>) woman without telling her about his sexual orientation, his behavior is categorically condemned as ‘womb fraud’ (*pian zigong*), which compounds his earlier ‘fault’ of ‘marital fraud’ (*pian hun*).

This section explains how the discourses and feelings around the pseudo-legal<sup>104</sup> term ‘womb fraud’ are constructed, and what realities have been produced out of the very problematizing and condemning of ‘fraud’. Before taking a closer look at how *tongqi*s tell their stories of being ‘defrauded of their wombs’, we should examine whether same-sex-oriented people in mainland China enjoy legal rights to have children within a different-sex marriage, and more specifically, whether the courts would deny a same-sex-oriented person custody in a divorce lawsuit on the ground of his or her sexual orientation.

#### 4.4.1 Custody Decisions in Mixed-Orientation Divorces

The Marriage Law does not prohibit people of any sexual orientation from getting married or having children, nor does it oblige people to reveal their orientation beforehand.<sup>105</sup> In terms of the custody after divorce, it only gives vague instructions as to who the child should live with in case of disagreement: ‘the people’s court shall make a judgment in accordance with the rights and interests of the child and the actual conditions of both parents’.<sup>106</sup> There is no law explicitly prohibiting same-sex-oriented people from being a custodial parent, but nor are there non-discrimination rules stipulating that sexual orientation alone should not be a ground for depriving one of custody. That leaves the courts a wide margin of discretion in custody disputes, the results of which often depend on the unspoken sympathies or prejudices about same-sex-oriented people as parents of the particular judges.

In a divorce case in 2014, a trial court in Hangzhou, Zhejiang Province explicitly found that the plaintiff’s claim that the homosexual orientation of the defendant was detrimental to the physical and mental health of the

103 A self-claimed *tongqi* is simply presumed straight in public. Such presumption is also seen in PFLAG parents, as discussed in Section 1.3.3.

104 ‘Fraud’ in Chinese contract law and criminal law only refers to gaining another person’s property by intentional deception. One’s property gain needs to result from the other’s loss of possession and/or ownership, so it does not apply to the decisions made in intimate relationships to ‘give’ one’s love, sex, and reproductive body to another based on false information. Hence ‘womb fraud’ is not a meaningful term in Chinese law.

105 See Chapters 2 and 3.

106 Marriage Law, Article 36 (3).

child lacked evidence, so the court could not support it.<sup>107</sup> A trial court in Shijiazhuang, Hebei Province, however, reached the opposite decision in 2013. It reasoned,

‘the homosexual acts of the defendant violate existing *normal mainstream values and traditional ethics*. Such acts will impose a detrimental influence on the child’s healthy development.’<sup>108</sup>

Therefore, the court upheld the presumably straight spouse’s claim for custody.<sup>109</sup> Note that in international law, arguments for the ‘traditional’ or ‘normal’ family have been rejected in some cases concerning same-sex parenting,<sup>110</sup> but it has not been challenged or substantially debated in Chinese courts, at least not from what we find in existing, sparsely-worded judgments.

In another case, the court did not explicitly discuss the possible influence of the husband’s homosexuality on the child in its merits, but vaguely stated, ‘considering the actual conditions of both parties and the healthy development of the child, it is appropriate to grant the custody to the applicant (the wife)’.<sup>111</sup> Ambiguous judgments like this can hardly be proved discriminatory. In several other cases, the party who was said to be a homosexual denied it, so the courts either found the evidence of the other party insufficient,<sup>112</sup> or found the alleged homosexuality an irrelevant factor.<sup>113</sup>

We cannot know whether the ‘homosexual’ parties have tried to argue in court that same-sex-oriented parents pose no threat to children’s sexual and gender development, something that is often heard in other jurisdictions.<sup>114</sup> In China, most chose to secure custody by denying the

107 *Zhou v. Wang*, Jiangan, Hangzhou, 2014, No. 511 (周某与王某甲离婚纠纷一案民事判决书, 杭州市江干区人民法院(2014)杭江笕民初字第511号).

108 *Zhao v. Pang*, Gaoxin Trial Court, Shijiazhuang, 2013, No. 00280 (赵某与庞某甲离婚纠纷一案民事判决书, 石家庄高新技术产业开发区人民法院(2013)石高民一初字第00280号).

109 *Ibid.*

110 See e.g., *Atala Riffo and Daughters v Chile*, Application No. 1271-04, IACHR (2012), para. 145.

111 *Wang v. Fang*, Putuo Trial Court, Shanghai, 2013, No. 228 (方某某与王某某离婚纠纷一案一审民事判决书, 上海市普陀区人民法院(2013)普民一(民)初字第228号).

112 See e.g., *Huang v. Xu*, Shaoyang Intermediate Court, 2011, No. 385 (上诉人黄建良与被上诉人许跃花离婚纠纷一案民事判决书, 邵阳市中级人民法院(2011)邵中民一终字第385号).

113 See e.g., *Wang v. Su*, Haishu Trial Court, Ningbo, 2012, No. 1966 (王某与苏某甲离婚纠纷一案民事判决书, 宁波市海曙区人民法院(2012)甬海民初字第1966号).

114 See e.g., *Atala*, above footnote 110, para. 128. See also a case in South Africa, *J and Another v Director General, Department of Home Affairs and Others* (CCT46/02) (2003). For the queer critiques of such an argument, see Nancy D Polikoff, ‘We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not Dismantle the Legal Structure of Gender in Every Marriage’ (1993) 79 *Virginia Law Review* 1535-1550; Suzanna Danuta Walters, ‘The Kids Are All Right but the Lesbians Aren’t: Queer Kinship in US Culture’ (2012) 15 *Sexualities* 917-933; Clifford Rosky, ‘Same-Sex Marriage Litigation and Children’s Right to Be Queer’ (2016) 22 *GLQ: A Journal of Lesbian and Gay Studies* 541-568. These authors argue that the apologetic immutability argument implied in the rhetoric that ‘gay parents would have no influence on children’s (hetero)sexuality’ is not helpful to destigmatize homosexuality, and even does harm to the visibility and rights of queer children.

accusation of homosexuality, rather than proudly coming out and making non-discrimination arguments. The courts tend to ignore this factor, too, at least not making it explicit in their judgments. As suggested by some courts' legal reasoning, decisions relating to custody of children are made primarily according to the age of the child, the willingness and the financial status of the parents, as well as the parent-child relationship. In these cases, custody disputes between mixed-orientation couples look just like a lawsuit between 'normal' spouses.

#### 4.4.2 Experiencing 'Womb Fraud'

The courts' silence on the parties' sexual orientation tacitly acknowledges that parents do not have to be heterosexuals, which is true according to positive law. However, it is such legalism that makes *tongqis* feel unfairly treated, because courts neglect their contributions to housework and parenting, and most importantly, they believe their hurt feelings as the result of having been 'swindled' are ignored. The disparity and tension amongst old written laws, emerging sexual identities and *tongqis'* felt injustice partly explains why the term 'womb fraud' gains ground.

'Womb fraud' is a term that best illustrates the gendered nature of marriages, including but not limited to mixed-orientation ones. While 'marriage fraud' is occasionally used to describe a lesbian marrying an unsuspecting straight man, 'womb fraud' can only be conducted by a man towards a woman. Lesbian mothers in mixed-orientation marriages are rarely labeled 'frauds', but are often pitied as suffering intersectional oppression both as wives, mothers and a sexual minority. In comparison, numerous articles can be found online, written by *tongqis*, pro-*tongqi* feminists, and pro-*tongqi* gay men that condemn 'womb fraud'. In the following section, I will focus on the story of one of my *tongqi* respondents, so as to make sense of their accusation, and of the reality-making effects of the discourse 'fraud'.

Yanzi is a self-identified 'ex-*tongqi*', namely a divorced woman whose ex-husband was gay. After a lengthy custody lawsuit, she is now raising their twin daughters while running her own business. When recalling her former marriage, she believed that her gay husband Sun Lei had long been planning to 'defraud her of her womb':

'He told me that a friend of his had very cute twin sons via IVF. He smiled and said that we could have babies like this as well. I was persuaded, and this was how I fell into his traps step-by-step. Actually, he had done quite a lot of research on IVF back then, while I knew nothing about it.

During our two-year marriage, especially after I gave birth to our twin daughters, we had sex very few times. The celibacy during IVF treatments was a good excuse for him to avoid having sex with me. Also, having twins via IVF might be part of his preparation for divorce from the very beginning, so that he could have the chance to have the custody of at least one child. He never thought about whether the process was good for my health or for the babies. We spent around 30,000 RMB to undertake IVF. Nine ova were taken out of me at one time, and my health significantly worsened afterwards.'

Yanzi continued angrily:

'I heard some gay couples are choosing surrogacy in the U.S., but not many people can afford that. So, I was actually used by my ex-husband as a free surrogate mother. Plus, it was I who paid all the IVF fees!

I often wondered, you gay guys are still men, so how the heck can you say you belong to a vulnerable group? You want to get married and have kids? Just make more money, go abroad, marry your partner and do surrogacy! Why are you harming us innocent women?'

Through Yanzi's heartfelt words, we can catch a glimpse of why many *tongqis* feel they have been 'fooled'. For them, 'womb fraud' implies that they took the painful journey through pregnancy and childbirth under the false belief that their husbands were straight men who sincerely loved them. They believe that they lost their wombs and ova, together with their love and chastity, to an unworthy man who is both a 'trickster' and a closeted 'sexual pervert'.

Their anger is understandable, considering the enormous sacrifices in terms of career and personal life women make by becoming mothers. A woman may reasonably feel more furious when her marriage fails to meet her 'basic' expectation (having a straight husband), let alone the ideal of a romantic, sexually harmonious and reproductive marriage. Such an ideal is also linked to the ideal route towards parenthood: a straight man and a straight woman (instead of one being closeted homosexual) making a baby within marriage (rather than unmarried) out of mutual love (instead of the duty to carry on family blood) through 'natural' intercourse (instead of via ART). In contrast, when a 'gay' man's wish to have children appears not to be the result of sexual attraction to, and romantic love for his wife, but due to pressure to procreate and his need to pass as straight, he is understandably denounced as selfish and misogynous. 'Gay' husbands' perceived inability to truly love a woman also makes *tongqis* believe that a gay father is essentially worse than a straight one, without realizing that unloving marriages aimed at procreation are a widespread phenomenon in China, and elsewhere, rather than one specifically involving Chinese gay men.

In fact, there are other reasons why Yanzi got married to Sun in haste and had children. One is a superstitious custom in her hometown, 'counterbalancing bad luck (*chongxi*)'. Before she met Sun, Yanzi's father was already seriously ill, so she wanted to get married and have children as soon as possible, hoping to make her father healthy again. Besides, she said she was a 'traditional' woman who never thought it important to check whether she was sexually compatible with her betrothed before getting married. She also believed that a good woman's virginity should be reserved for her husband. Like Yanzi, another *tongqi*, Ah-Mei, entered into marriage three months after meeting her husband, 'without even holding hands'.

One should not, however, simply blame *tongqis*' own 'recklessness' in marrying someone without first checking out his sexual preferences, or their own 'conservativeness' of thinking about sex only in terms of reproduction.

The shaming of women's sexual desire outside marriage *and* the excessive importance placed on good sex life in consumerist China are the two sides of the same coin of sexuality/power that traps many *tongqis* in a double-bind. Here the cultural norm, familial expectation and gender factors all played a role in her decisions to marry and have children.

Note that the complaint of 'womb fraud' is almost never made by a woman who has had a child with an indifferent or irresponsible straight husband. It is not uncommon that straight men and women get married 'at the appropriate age' out of familial and societal expectations that they procreate, without having established romantic love or developed harmonious sex; and there is no less effort involved and no fewer grievances that arise from pregnancy, birth-giving and child-rearing in a 'normal' marriage. However, unhappy wives in straight marriages tend not to think of their marriages as exploiting their wombs, probably because women's unpaid reproductive roles are so commonly undervalued that they simply take it for granted and swallow their bitterness. The gender inequality behind such a commonplace phenomenon is difficult to detect and challenge, but when a partner's homosexuality with its concomitant stigmas are exposed, it becomes the primary scapegoat for an unhappy marriage that can actually have complicated origins.

Newly invented phrases though they are, 'marriage fraud' and 'womb fraud' within the context of mixed-orientation marriages in China resonate with Marxist feminist traditions, which have striven to debunk the false consciousness of women whose unpaid labor in marriage and child-rearing are justified in patriarchal societies.<sup>115</sup> In China, a report found that the ratio of hours of unpaid care work between men and women was 0.389 in 2015, meaning that if men worked for 4 hours, women would work for 10, suggesting a high level of gender inequality in the domestic sphere.<sup>116</sup> In this sense, one might detect a kind of radical feminist awakening in that many *tongqis* started to question the 'naturalness' of women's duty of birth-giving and parenting in marriage, realizing that women are entitled to sexual satisfaction, to negotiate the sharing of housework and child-rearing duties, and to ask to be treated with respect.

Nevertheless, it is a pity that *tongqis'* emerging feminist awareness mainly fires against gay men, as a result of homophobic prejudices whereby gay misogyny is essentially seen as worse than other forms of misogyny.<sup>117</sup>

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115 Fredrick Engels, *The Origin of the Family, Private Property and the State* (1884) at [www.webcitation.org/6qWjSR3FF](http://www.webcitation.org/6qWjSR3FF); M Wagner, 'Fish Can't See Water: The Need to Humanize Birth' (2001) 75 *International Journal of Gynecology and Obstetrics* 25-37.

116 Global Institute McKinsey, 'The Power of Parity: How Advancing Women's Equality Can Add \$12 Trillion to Global Growth' (2015) 18.

117 Richard Dyer, *The Culture of Queers* (Routledge, London and New York, 2002) 46-48. For more thorough discussions on gay misogyny, see David M Halperin, *How to Be Gay* (The Belknap Press of Harvard University Press, Cambridge, London, 2012).

Singling out same-sex-oriented men for condemnation leaves unchallenged heteronormative assumptions about marriage, misses the wider social-legal environment that undervalues motherhood in and outside marriage, and unfortunately ends up antagonizing *tongqis* and gay men who are both constrained by the straightjacket of marriage and reproduction.

#### 4.5 BECOMING PARENTS IN COOPERATIVE MARRIAGE

The previous two sections have shown that same-sex-oriented people are bound by the straightjacket of heteronormative parenthood: they have to suffer moral condemnation and possibly negative decisions about custody of their offspring if they have children in a mixed-orientation marriage; however, if they do not submit to marriage, their options regarding parenthood are limited, legally risky and more demanding of socio-economic resources. In that light, becoming parents within cooperative marriages seems to balance well legal benefits and respectability. This section looks into the pros and cons of cooperative parenting, paying particular attention to the intersection between gender, sexuality, socio-economic status, legal residence, etc.

##### 4.5.1 Legal Advantages and Disadvantages

As we heard previously,<sup>118</sup> after donning a ‘fig leaf’ or a ‘social outfit’ by marrying a gay man, Jasmine continued by putting on other parts of the straightjacket: having a child. The legal benefits of becoming parents in a cooperative marriage are obvious. Once having entered into a legal marriage, spouses’ sexual orientation becomes largely irrelevant, and the heteronormative laws that regulate parenthood are no longer a stumbling block. Jasmine recalled:

‘We went through the formalities as an “ordinary” couple would: first, both of us requested a stamp from our employers; then I collected another stamp from the household department of my place of birth; and after some other cumbersome paperwork that I can’t remember clearly, I was finally given the birth permit.

All these procedures require your marriage certificate. It is also a must if you want to have any fertility treatment in a good public hospital. The child’s residence registration is premised on the trio package of the marriage certificate, the birth permit and the birth certificate from the hospital – none is dispensable. The same goes to the claims for health insurance for the child. We were lucky that we are locals in Beijing; otherwise the formalities could have been even more complicated.’

Jasmine’s words illustrate how a real marriage certificate can make a huge difference in dealing with the administrative procedures surrounding reproduction. Similarly, armed with a marriage certificate, they did not find it difficult to have a child via IUI:

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118 See Sections 1.1 and 3.3.1.

'We both had health examination and proved fertile, but we simply told the doctor that we couldn't have babies through intercourse no matter how hard we tried, and there were no diagnosable reasons. These words sufficed. The hospital would actually do IUI or IVF-ET for any couple, as long as you show your marriage certificate and pay. Of course, I guess you can also use some personal connections to do it without a marriage certificate, but for us it was just much easier to go through the standard procedures.'

Besides the expected legal conveniences, having a child also significantly minimized her parents' tendency to interfere and be controlling, since it is widely believed that a Chinese woman only becomes independent from her original family once she gets married and gives birth. Now Jasmine has more space with her same-sex partner Meng after moving out from her parents', although their hard-won space is at the same time shrinking due to their day-to-day baby-sitting responsibilities. Once married, says Jasmine, there can also be generational disagreements between the spouses and their parents about the 'best' way to bring up a baby, though luckily they have avoided such disputes, since all four grandparents are happy to put their trust in their highly educated children.

Although the straightjacket has provided the cooperatively married couple with legal conveniences and social status heterosexual couples enjoy, there is an insoluble problem. The non-birth parents, namely the same-sex partners of the cooperative husband and wife, are left in a legal vacuum in terms of their rights and duties vis-à-vis the child. As parenthood cannot be established via contract or *de facto* custody, they have little room for maneuver within the law. According to Jasmine, the two other parents are taking care of the child without being recognized, either by law or by their social surrounding:

'After giving birth, I've continued to live with my partner Meng instead of my husband. We simply told my parents that she is a good friend of mine. We told them she likes children, and she's single anyway, so she's willing to live with me and offer some help. We don't plan to come out to our folks – otherwise why bother having a cooperative marriage – but I do hope when Meng appears more frequently in front of my parents, they will get used to her existence, and then naturally they all get along without putting the cards on table.

The partner of my husband is actually also devoting a lot of time and energy to babysitting during the day time on weekdays, but as he is totally invisible to our parents, his efforts are unappreciated.'

They did not try to make any written arrangements as to the rights and obligations of Meng and Tao in relation to the baby, either:

'We find parental love and mutual trust among the four of us more important. If the trust were gone, disputes would be unavoidable, and then I guess a contract wouldn't help that much. That's why I keep saying that it's crucial to find a reliable comrade to wear the outfit with you, together.'

Jasmine also told me, similar to Mumu's words above,<sup>119</sup> the invisibility of non-birth parents in law and daily life can also be one of the reasons why some same-sex couples break up after one partner enters into cooperative marriage and has a child. The non-birth partner can feel insignificant and insecure before the legally and culturally more 'authentic' spouse, although ironically the latter is just supposed to be there to cover the 'real' same-sex relationship.

In Jasmine's story, most of the laws she and her husband encountered with are the procedures on childbirth and registering the child's residence. Of course, they are also automatically bound by the provisions on parenthood in the Marriage Law, as well as the Inheritance Law in case one of the members of this core family deceased.<sup>120</sup> They tend to obey and use the law more than they act against it, because most of the time the law is on their side as a legally married couple. However, when it comes to the relationship among the four parents and that between the two *de facto* parents and the child, the laws are inadequate to recognize and protect all of them.

#### 4.5.2 Feminist Awareness in Cooperative Marriage

Giving birth in the context of a cooperative marriage, just as in any marriage, is inevitably a feminist issue. Cooperative marriage might be perceived as more egalitarian, yet research has shown that the reality can be much more complicated.<sup>121</sup> When a lesbian becomes a mother in marriage, she is, like *tongqis* and most straight women, also largely trapped by a web of hetero-familial rules. Hui is a butch woman in her thirties. She had tried to conceive a baby via IUI with her cooperative gay husband, but had a miscarriage. During her pregnancy, her then girlfriend broke up with her, because Hui's mother moved in to take care of her, meaning it was not possible for her to spend enough time to nurture her same-sex relationship. Her worries about her own future intimate life were similar to those of many straight single mothers:

'For lesbians who have children by whatever means, the kid can be an incurable scar on their future life. I mean, at least it's a burden. I'm afraid it's very hard for a lesbian mother to find someone, either woman or man, who loves her and her child alike.'

This being said, Hui was still trying to get pregnant, because it is difficult to swim against the mainstream in a small city:

119 See above, footnote 78.

120 For the rules on intestacy and legacy, see Section 5.2.3.

121 Yaya Chen, 'Challenges on Traditional Marriage by the Marriages and Families of Lesbians (女同性恋者的婚姻和家庭给传统婚姻制度带来的挑战)' (2009) 29 *Society* 4, 1-23; Wang, 'Cooperative Marriage' (2015); Elisabeth Lund Engebretsen, *Queer Women in Urban China: An Ethnography* (Routledge, New York, 2014).

'I really liked children before, but now I'm hesitant. Even if I were pregnant again someday, I guess I wouldn't feel as happy as I did last time. Now it's more like fulfilling an obligation on a road everyone is traveling.'

While Hui sees the compulsory nature of heterosexual marriage and childrearing, some other lesbian respondents come to realize that it is unfair simply to divide all the expenses in half in a supposedly egalitarian marriage.<sup>122</sup> Without the prevalent ideological assumption that marriage is about being self-sacrificing because of love, lesbians tend to be more aware of the taken-for-granted contributions women make in marriage, and above all, in reproduction. As Fei, a lesbian who is seeking a cooperative marriage, complains in her blog,

'Those gay men who want to have kids with their cooperative lesbian wives are really self-ish! They either treat lesbians as free birth machines plus babysitters, or propose hypocritically that we split the fees of childbearing and rearing. What? You mean you wank-off one time and then live as you wish, while I'm pregnant for ten months, suffering the pain of birth giving, and sacrificing my career? You call that 'going Dutch'?

Sure, how about going Dutch this way: you provide the sperms, I offer the ova, we find a surrogate mother, and let's split the fees of surrogacy. It is then that the gay men let the cat out of the bag (*louxian*). They would say, "I'd rather just pay 100,000 RMB for a surrogate mother; why bother having a cooperative marriage like this?"

Ha, 100,000? Let me do the math for you. 280 day's pregnancy, plus preparing for 3 months before and recovering for 3 months, that's 11040 hours in total. 100000 divided by 11040 is about 9.05. You mean a lesbian wife's labor is only worth 9 Yuan per hour?<sup>123</sup> We provide our ova, risk our lives and sacrifice our careers to earn that tiny amount; are we slaves or what? I'd rather work in McDonald's. They pay 9.6 Yuan per hour, and the staff can get half-priced burgers!

She concluded by making some comments about the gendered nature of marriage in general:

'Seriously, if men are reliable, then pigs can climb up the trees, too! Gay men are just as untrustworthy as straight ones, so women should best be self-dependent. Cooperative marriage is like any marriage – they are all stark-naked transactions! We should just put on the table what we want from marriage. If you don't agree, then leave and find someone else. Don't try to take advantage of anyone.'<sup>124</sup>

Fei's comments do voice the complaints many (lesbian) mothers are holding back. And her observation of marriage as transaction is a sharp one, and one that has long been attested to by Marxist feminist scholarly works.<sup>125</sup> As lesbians are more sensitive to the unequal nature of the institution of marriage, few of them are willing to conceive a child with a gay husband.

122 Such 'pseudomutuality' has been discussed in Section 3.3.1.

123 Which was then about 1.3 euros.

124 Acknowledgement to Yuan Yuan who provided me this excerpt among other cooperative-marriage stories she collected online.

125 Gayle S Rubin, 'The Traffic in Women: Notes on the "Political Economy" of Sex', *Toward an Anthropology of Women* (1975); Engels, *The Origin of the Family* (1884).

In fact, the most frequent trigger for fights between lesbians and gay men who are in or seeking cooperative marriages is the ‘kid problem’. As Xiong, the initiator of the aforementioned cooperative-marriage matchmaking group,<sup>126</sup> told me, organizers like her have come up with an idea to minimize disagreements. They divide a group into two subgroups: a ‘wanting-child’ one and a ‘no-child’ one. People are then expected to find the right match more easily by filtering out those who have different family plans. Interestingly, such division leads to an overt gender imbalance – gay men in the wanting-child subgroup dramatically outnumber lesbian women, and vice versa. This again may hint at the often-underappreciated work women do as mothers.<sup>127</sup>

The ‘kid problem’ may also suggest that for Chinese men the most constraining part of the straightjacket is probably the duty to procreate rather than getting married, which is also shown in Zhao Jun’s mother’s quick acceptance of his homosexuality when he had a child yet not a wife.<sup>128</sup> In contrast, Chinese women are more likely to have the double pressure of getting married *and* having children within marriage. Being single mothers is legally and economically difficult,<sup>129</sup> whereas being childless, whether in or outside of marriage, can also incur gossips. Between rock and a hard place, lesbians seem to find it relatively acceptable to only have a social outfit of different-sex marriage while rejecting the onerous responsibilities of motherhood within heteronormative families.

Meanwhile, *tongqis*’ using of ‘womb fraud’ also provides discursive resources for other women to rethink sacrifice and maternal love. In a forum called ‘Failed Cooperative Marriage Bar’, a lesbian blogger told her story of being almost defrauded by a straight man who pretended to be gay and would like to have her as a free surrogate mother.<sup>130</sup> She concluded that a man’s sexual orientation has no bearing on ‘womb fraud’ as it is being committed by gay and straight men alike, while being ‘swindled’ an experience common to women’s be they lesbian or straight.<sup>131</sup> Biased as her words sound, lesbians’ reluctance to give birth in a cooperative marriage may indeed be another signal of emerging feminist awareness, which has made the existing gender inequality in marriage and reproduction in ‘ordinary’ marriages more visible and more openly discussed.

While the above accounts rightly point out certain structural power imbalances in the patriarchal institution of marriage, we should not ignore that married men can acquire ideas of egalitarian parenting, although they

126 See Section 3.3.1.

127 Susan J Douglas and Meredith W Michaels, *The Mommy Myth: The Idealization of Motherhood and How It Has Undermined Women* (Free Press, New York, 2004).

128 See Section 4.3.2.

129 See Sections 4.2.1, 4.4.2, 4.2.6 and 4.3.1.

130 Little Prince in the Moon, “‘Womb Fraud’ is Irrelevant to A Man’s Being Straight or Gay’ (骗子宫, 还分什么直男与GAY), *Failed Cooperative Marriage Bar* (形婚失败吧), 22 November 2015, at [www.webcitation.org/6nU2opzA6](http://www.webcitation.org/6nU2opzA6).

131 Ibid.

may not call themselves feminists. Jasmine told me about the parenting experiences in her cooperative marriage:

'In the beginning, my gay husband often annoyed my partner and me. He just left us some money, and was rarely grateful for the time and effort I devoted in getting pregnant and giving birth. After a few small fights, now he's become much more considerate to me, my partner and the child.

I told him that he didn't have to come over to see the child every day, but he insisted. Since he's witnessed all my efforts, he's shown me much more respect ... Over time, we've really started to feel that we're comrades standing by each other.'

Jasmine used the word 'comrade' to describe her familial relationship with a gay man, who gradually learnt to be more caring and responsible in a marriage where he cannot just play the breadwinner. Although same-sex-oriented people do not live entirely free from the constraints of hetero-patriarchal laws and thoughts, the subtle changes exemplified by Jasmine's comradeship are giving new meanings to marriage and parenthood bit by bit.<sup>132</sup> And it is in such comradeship that gay male identity and feminist awareness converge. Such convergence requires the dedication of both partners, which, as explained above, is oftentimes not the easiest option for (gay) men. It is foreseeable that more conflicts and coalition will emerge in the ongoing transformation of family and its laws.

#### 4.6 CONCLUSION

As with marriage, a host of social-legal norms in pluralist Family Law are concurrently governing the domain of parenthood. FL1, namely the official laws on the narrowly understood family issues, include the 'birth permit', assumption of paternity, guardianship, adoption, fostering and assisted reproductive technologies (ART).<sup>133</sup> Through these laws we have seen how tightly childbearing and rearing are bound up with different-sex marriage. Meanwhile, several laws do acknowledge wider notions of kinship, which has the potential to be interpreted as recognizing same-sex families. For instance, one may obtain guardianship of a friend's child if no next-of-kin is suitable;<sup>134</sup> an eligible fostering family in Zhongshan city does not have to be a 'complete' or 'traditional' one;<sup>135</sup> and ART was, or may still be, open to unmarried women in Jilin province.<sup>136</sup> These possibilities have not been reportedly tested by same-sex-oriented people, but we may see activism that pushes the authorities to clarify the status of same-sex parenthood and

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132 For a discussion of queer comradeship between cooperatively married couples, see Wang, 'Cooperative Marriage' (2015).

133 See Section 4.2.

134 See Section 4.2.3.

135 See Section 4.2.5.

136 See Section 4.2.6.

other forms of parenting outside of a ‘normal’ marriage. FL1 also appear in the judgments of court cases, as we saw in the custody disputes, where the sexual orientation of one parent is weighed differently.<sup>137</sup>

Some FL2 and 3, i.e., the laws regulating family relationships in seemingly non-family terms, appeared in this chapter, such as the laws and policies on employment, household registration (*hukou*) and the establishment of sperm banks. FL4 is powerful in many ways: same-sex-oriented young adults in China are facing huge pressure to become parents, especially those of the one-child generation;<sup>138</sup> the idea that adoptive children are not as ‘*qin*’ as biological ones;<sup>139</sup> the medical standards in CCMD-3 that continue to partly pathologize homosexuality are appropriated to deny foreign same-sex couples to adopt Chinese children;<sup>140</sup> the cultural norm of marriage and procreation as counterbalancing bad luck for their family members (*chongxi*) has influenced some people’s decision to marry hastily;<sup>141</sup> and the commonplace belief that housework and child-rearing labor are ‘invaluable’ thus actually valueless have made married women, whether lesbians or *tongqis*, more likely to feel underappreciated. Meanwhile, some FL4, while onerous, can also be useful. For instance, *guanxi* (social connection), or ‘Chinese characteristics’ as one respondent calls it, has become a soft yet powerful weapon against unsympathetic laws.<sup>142</sup>

Inevitably, heteronormative Family Law in China has been contested, tacitly if not outspokenly, because same-sex parenthood has become an irreversible fact, a real-life arrangement rather than a remote fantasy. Same-sex oriented people have made it happen in many ways, with various kinds of legal consciousness. Some of them have become parents ‘against the law’, without first getting formally married, but via in vitro fertilization, transnational surrogacy, or *de facto* adoption.<sup>143</sup> In these cases, the lack of marriage certificate creates many barriers and they often have to surf legally grey areas in order to surmount them. *Guanxi* (often fueled with money and/or gifts) then has an important role to play. Of course, it offers much less certainty than a law that clearly grants rights to more subjects and relationships other than marriage, and maintaining *guanxi* often entails extra financial and emotional investment.

In comparison, having children in a formal marriage – before or with the law – is a most cost-effective means of becoming parents, which also produces the greatest degree of social ‘normalcy’. The substantial and procedural legal conveniences partly explain why many same-sex oriented people opt for cooperative marriages, or for marrying an unsuspecting

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137 See Section 4.4.1.

138 See Section 4.1.

139 See Section 4.3.3.

140 See Section 4.2.4.

141 See Section 4.4.2.

142 See Section 4.3.1.

143 See Section 4.3.

person of another sex. In the latter case, however, the 'gay' men are berated for having committed 'womb fraud', because they fail to fulfill *tongqis'* expectations of becoming parents with a loving, heterosexual husband. The 'womb fraud' discourse, just like that of 'marriage fraud' discussed in the previous chapter, is built on the essentialized idea of inborn and immutable homosexuality, a crucial truth about which one must be forward and frank; it also bundles marriage with hetero-romantic sexual love.<sup>144</sup> It again brings to the fore the contradictory demands made on same-sex-oriented people both to become a parent in a straight marriage and to confess the 'gay truth' to their spouses. Consequently, the 'womb fraud' dilemma has posed a pressing question for the lawmakers: if 'defrauding' an unwitting person is not the optimal choice for some same-sex-oriented people, should they be provided with lawful means to become parents alone or with their same-sex partners?

While its homophobic connotation should be criticized, the popularization of the 'womb fraud' discourse among *tongqis* and some lesbians does suggest the rise of feminist awareness in these women, especially with regard to their unpaid and underappreciated efforts in childbirth and child rearing, on top of other domestic duties. This also explains why many cooperative marriages fail even at the negotiation stage: gay men find lesbians 'too greedy' for asking for too much money or care, whereas lesbians see gay men 'too selfish' in placing too little value on their efforts and sacrifices. Such conflicts are unavoidable in a complicated Chinese society where 'progressive' egalitarian and 'conventional' patriarchal ideas about marriage and parenthood are competing for legitimacy in every aspect of Family Law.

Similarly, although the gay rights and women's rights movements often fight together against hetero-patriarchy, when it comes to the issue of reproductive justice, the two do not always have the same focus: while the latter tend to highlight how mothers are disadvantaged in a largely patriarchal society, the former often stress the heteronormative familial and social imperatives that push gay men to marry straight women and to procreate in the first place. In fact, these two angles are not necessarily contradictory, especially when we realize they are both contextualized in hetero-patriarchal family laws that do not offer people of any gender and sexual orientation feasible alternatives to the straightjacket. If we only bring into conflict women's rights and gay men's rights, we may lose sight of the interwoven strings that trap everyone in the normative kinship system that valorizes marriage, reproductive sex and biological ties, while undervaluing other family forms.

Last but not least, without denying some same-sex-oriented people's whole-hearted love of kids, we should nevertheless pay attention to the socio-legal environments that play a crucial part in constructing their

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144 See Section 4.4.2.

'internal wish', the wish to have children, to give their children a 'complete', 'stable' and 'normal' family, as well as their parents' zealous expectation for grandchildren in such a family. One significant constructive factor is the common belief that raising a child is a worthy investment for one's later life.<sup>145</sup> Such an 'old-age-insurance' function of marriage and childrearing still persists, and even valorizes nowadays, when social welfare is drastically shrinking and healthcare is being increasingly privatized. This has perpetuated the arc of 'victim-victimization' from one generation to another, meaning that even though the old generation may not be happy in this straightjacket, they do not want to see their children exempt from it.<sup>146</sup> I will discuss in next chapter on how same-sex-oriented people, their partners, spouses and parents imagine and experience their old age – before, with and/or against family law. There, we will also see how the straightjacket further requires Chinese people to get eldercare in a hetero-reproductive family, which generates much anxiety, fear, yet also some unexpected care-free feelings.

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145 Lung-kee Sun, 'Contemporary Chinese Culture: Structure and Emotionality' (1991) 26 *The Australian Journal of Chinese Affairs* 26, 1-41, 39.

146 Ibid.



‘Go home often, go home often, helping mom with the dishes, giving dad a back and shoulder massage...’ The song went viral after being performed at the 1999 National Spring Festival Gala, a Chinese arts extravaganza partly serving the purpose of state-party propaganda. Most Chinese people, young and old, urban and rural, could sing its chorus. In 2013, a provision to encourage ‘going home often’ was written into the revised Law for the Protection of the Rights and Interests of the Elderly,<sup>1</sup> which is commonly called ‘Eldercare Law’ or ‘Filial Piety Law’. On the same day when the law entered into force, a trial court in Jiangsu Province in eastern China ordered the daughter and son-in-law of a 77-year-old woman to visit their mother at least once every two months, and on at least two public holidays every year, as well as on at least one day during the Lunar New Year holiday.<sup>2</sup> The mother was entitled to ask that the court fine or even detain her daughter and son-in-law if they failed to visit.<sup>3</sup>

The ‘go-home-often’ provision is an acknowledgement that it takes far more than the basic provision of food and shelter to ensure an elder happiness and wellbeing. The legally-underpinned requirement for children to visit their parents shows that in addition to economic support, an equally, if not more, important part of the care for the elderly is company, physical assistance and the comfort of being part of a functioning family unit. Nevertheless, this Eldercare Law, which implies the global neo-liberal trend of the privatization of care,<sup>4</sup> can hardly, of itself, alleviate the anxiety about ageing

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1 Law of the People’s Republic of China on Protection of the Rights and Interests of the Elderly (2012 Revision), adopted 28 December 2012, effective 1 July 2013 (hereinafter ‘Law on Protection of the Elderly’).

2 ‘Visit Mom, Orders Court’, *Global Times*, 2 July 2013, at [www.webcitation.org/6aXLRoSvj](http://www.webcitation.org/6aXLRoSvj).

3 The original text of the judgment cannot be found online, but the court’s official website has issued a newsletter on this case. See ‘Court Orders Daughter to Go Home Often’, *China Court*, 29 July 2013, at [www.webcitation.org/6aYDW1Bvn](http://www.webcitation.org/6aYDW1Bvn).

4 For the neo-liberal turn in the welfare system of some Western countries, see Anna Marie Smith, *Welfare Reform and Sexual Regulation* (Cambridge University Press, Cambridge, 2007); Debbie Laliberte-Rudman, ‘Risk, Retirement and the “Duty to Age Well”: Shaping Productive Aging Citizens in Canadian Newsprint Media’ in Jessica Polzer and Elaine Polzer (eds), *Neoliberal Governance and Health: Duties, Risks, and Vulnerabilities* (McGill-Queen’s Press, Montreal and Kingston, London, Chicago, 2016) 108-131. China’s socialist practices used to give people who live in the collective a sense of eldercare security. Elaboration of neo-liberal ideology after China’s Reform and Opening Up in 1979 can be found in Lisa Rofel, *Desiring China: Experiments in Neoliberalism, Sexuality, and Public Culture* (Duke University Press, Durham, 2007).

felt all over China, regardless of age and sexual orientation. It is projected that between 2015 and 2030, the share of China's population aged 60 years or over will rise from 15 per cent to 24 per cent, while local, provincial and national welfare budgets are unlikely to meet the growing needs.<sup>5</sup>

A host of factors contribute to the widespread anxiety about future security: Under the China's Family-Planning Policy before the reform in 2016,<sup>6</sup> city dwellers can only have one child (unless they're rich enough to afford the large fine) to count on when they get old; consumer price inflation makes it difficult to save money; fierce competition in the job market means life-long employment is no longer guaranteed; the media's exaggerated depiction of the elderly as weak, dependent and lonely; stories about abuse in nursing homes – they all contribute to people's desire to avoid living their later years outside their own family. As the younger generation is facing enormous pressure to make ends meet themselves, the traditional idiom 'bring up sons for help in old age; and store up grains against famine'<sup>7</sup> seems no longer a golden guarantee of a happy later life.

The previous two chapters have shown that having a different-sex marriage and having a biological child within marriage is a social and legal imperative, a straightjacket that simultaneously constrains and comforts. 'Ageing successfully'<sup>8</sup>, especially getting old with the care given by one's family members, is also an indispensable part of such a straightjacket. The cluster of Family Law on ageing and dying pivots around the 'hetero-familial good-life fantasy'<sup>9</sup> is one of the major forces that push large numbers of people, whether gay or straight, young or old, to think, feel and live accordingly.

Before I undertook the fieldwork, I would not have imagined that most same-sex-oriented people are talking and worrying about ageing and eldercare (*yanglao*), much more than my heterosexual acquaintances. One explanation could be that heterosexual Chinese couples are so distracted by the endless series of tasks, big or small, in their industrial-production-line familial lives, that they have less time to worry about ageing. Same-sex-oriented people that do not live in this straightjacket, on the other hand, confront loneliness, illness and hopelessness more directly and more often. No wonder many of them have jokingly started to call themselves 'old *tongzhi/lala/gay*' by their mid-30s. If not heterosexually married, they do not

5 See *World Population Ageing*, 2015, Department of Economic and Social Affairs Population Division, United Nations, ST/ESA/SER.A/390, 27.

6 Section 4.1 has discussed more about the Family Planning Policies.

7 The Chinese words being '养儿防老, 积谷防饥'.

8 For critical analyses of the neo-liberal imperative to age well, see Morten Hillgaard Bulow and Marie-Louise Holm, 'Queering "Successful Ageing", Dementia and Alzheimers Research' (2016) June *Body and Society* 1-26; Debbie, 'Risk, Retirement and the "Duty to Age Well"' (2016).

9 The term is borrowed from Lauren Berlant, *Cruel Optimism* (Duke University Press, Durham and London, 2011) 11.

even qualify for the whole wedding-planning, car-purchasing, mortgage-paying diaper-changing, dramas-with-the-in-laws whirlwind of conventional family life. These 'sweet burdens' are also privileges that come with being 'normal' and that postpone one's old-age crisis.

Meanwhile, there seems a conflation in society whereby being gay equals being childless equals being unfilial to their folks equals being pathetic in old age. This stereotype is often internalized by same-sex-oriented people themselves. Their anxiety is thus two-fold: firstly, the pressure, moral and legal, of their duty to care for their ageing parents, if any; and secondly, their own fear of ageing and dying alone and uncared for. These two intertwined issues have been a constant and appalling threat of 'no future'<sup>10</sup> for both same-sex-oriented people and their parents in China. Both these aspects warrant closer examination, as do the connections between them.

This chapter shows first how Family Law echoes the neo-liberal shift of responsibility for eldercare from the state to the family. It also highlights several laws that tacitly recognize non-marital relationships in certain scenarios with regard to medical care or dependent's rights (Section 5.1). In terms of same-sex-oriented people's care-giving obligations towards their parents, it discusses the democratization of intergenerational familial relationships in China, where filial piety is no longer a non-negotiable package of support and obedience (Section 5.2). It also presents three ethnographic stories of elderly same-sex-oriented people living in contemporary China, where counter-intuitively their legally unrecognized relationship forms do not always seem to obstruct their well-being (Section 5.3). The conclusion draws together the discussions on Family Law and legal consciousness about the heteronormative elder life as part of the straightjacket (Section 5.4).

## 5.1 LEGALLY SANCTIONED WAYS OF GETTING OLD IN CHINA

To be clear, later life is not substantially different from other life phases in terms of the legal issues one may encounter. Elderly people may cohabit, get married, get separated, have children by various means, arrange their property, deal with tax and insurance, etc., much like younger ones; and illness, disability and death happen to young people, too. Therefore, the issues discussed in this section are not specific to the elderly, but are probably encountered more often when one gets old. As the housing, financial and parenting legal issues have been addressed in the previous chapters, this section mainly discusses Chinese Family Law in relation to older people's

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10 The future-oriented anxiety is discussed in Lee Edelman, *No Future: Queer Theory and the Death Drive* (Duke University Press, Durham and London, 2004).

freedom to marry or divorce, social and commercial insurance, medical care, death and inheritance. It examines the extent to which same-sex-oriented individuals and unmarried people in general, are or are not beneficiaries of these laws. In addition to the written rules (FL1, 2 and 3)<sup>11</sup>, it also brings into light some FL4,<sup>12</sup> as well as the practices of some same-sex-oriented people who have utilized or avoided these rules to negotiate a more livable old age in China.

### 5.1.1 Elderly People's Freedom to Marry

In January 2013, two elderly men announced online their mutual love. One of them is a retired teacher, another a blue-collar worker. They published some high-profile posts and videos, condemning discrimination and advocating social acceptance for *tongzhi*. On their wedding day, however, the teacher's son intervened violently, upended the banquet tables, drove away all the guests and even beat up some of them. The online live broadcast was consequently interrupted.<sup>13</sup>

The 2001 Marriage Law explicitly stipulates the freedom to marry,<sup>14</sup> and according to the Criminal Law, those who use force to interfere with others' freedom to marry may have committed a crime.<sup>15</sup> The 'Elderly Care Law' also stipulates such freedom and makes clear that a change to an older person's marital status does not abrogate the duty of his or her supporters.<sup>16</sup> However, it remains unclear whether the laws protect the freedom of elderly people to have a wedding with their same-sex partners.

Arguably, the freedom to marry entails the freedom to arrange one's private and family life according to one's own sexual, economical, intellectual or other preferences. It should also include the freedom to establish and develop one's intimate relationship that resonates with their choice of sexual

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

12 Ibid.

13 The accounts of the incidence and their statements can be found at their blog named 'the Love of Two Old Men', at [www.webcitation.org/6l3HUOXms](http://www.webcitation.org/6l3HUOXms).

14 Article 3: 'Marriage upon arbitrary decision by any third party, mercenary marriage and any other acts of interference in the freedom of marriage shall be prohibited.'

15 Article 257 (1) of Criminal Law reads: 'those using force to interfere in others' freedom of marriage are to be sentenced to two years or fewer in prison or put under criminal detention.'

16 Law on Protection of the Elderly, Article 21: 'The freedom of marriage of the elderly shall be protected by law. Their children or other relatives shall not interfere in their divorce, remarriage and post-remarriage life. The supporters shall not be relieved of the duty to provide for the elderly because of any change in the marriage of the elderly.'

activity and sexual identity,<sup>17</sup> to break up, to remain single, to get legally and/or ritually married, and to divorce. Moreover, neither same-sex sexual conduct nor cohabitation is prohibited in Chinese law.<sup>18</sup> In this sense, the two old men should have the freedom not just to marry someone of different sex but also to love and live with a person of the same sex, and should be free from arbitrary interference by any person, including their family members. On the other hand, it can also be argued that 'marriage' in the Criminal Law should be systematically interpreted in accordance with the Marriage Law, which is strictly limited to a man and a woman. If same-sex marriage is not intelligible in Chinese criminal or civil law, then having a same-sex wedding can hardly be legally recognized as exercising the freedom to marry.

Suppose this couple sued the son, what would the court say? The judges might find themselves between the proverbial rock and a hard place: if they adopt a narrow interpretation of marriage, then the possibly criminal act of interfering violently with a wedding might be condoned (unless it is prosecuted as intentional injury); yet if the son is found guilty, then the court might be seen, inadvertently, to have given at least *some* legitimacy to same-sex relationships and *some* legal consequences to their marital rituals. There has not been any criminal lawsuit filed by an elderly same-sex-oriented parent against his or her child or relatives so far,<sup>19</sup> probably due to the reluctance to go to a court against his or her own family member and of coming out in public.

### 5.1.2 Social and Commercial Insurance

By and large, the non-commercial social security system is not a guarantee for Chinese people's financial and physical security: high inflation and the ageing population is likely to render the basic endowment pension inadequate;<sup>20</sup> unemployment insurance is only given to people who do not intentionally terminate the employment;<sup>21</sup> the medical insurance only covers a limited range of medical expenses, and due to the shortage of public hospitals, it is not uncommon that people with lower income cannot afford proper treatment.

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17 For a discussion on the choice to the right to choose sexual activity and sexual identity and the right to establish relationships and families in accordance with this choice, see Michele Grigolo, 'Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject' (2003) 14 *European Journal of International Law* 1023-1044; Kees Waaldijk, 'The Right to Relate: A Lecture on the Importance of "Orientation" in Comparative Sexual Orientation Law' (2013) 24 *Duke Journal of Comparative and International Law* 1, 161-199.

18 See Chapter 2.

19 The crime of interfering by force with the freedom to marry can only be handled upon complaint, see Criminal Law, Article 257 (3).

20 Joe CB Leung, 'Social security reforms in China: Issues and prospects.' *International Journal of Social Welfare* 12 (2003) 2, 73-85, 95.

21 The Social Insurance Law of People's Republic of China, adopted 28 October 2010, effective 1 July 2011, Article 45.

It is worth noting that social insurance in neoliberal China is highly individual-based. Unlike some Western countries, where the marital status may influence a spouse's benefits,<sup>22</sup> social security payments in China are mainly determined by one's own work history and the premiums one has paid. Still, marriage plays an important role in redistribution of these benefits. According to the Marriage Law and its Second Judicial Interpretation, one spouse's endowment insurance should be deemed as the communal property of the couple.<sup>23</sup> Same-sex couples are not bound by this rule, which may disadvantage the dependent party in a long-term cohabiting relationship, since he or she is not legally entitled to share the pension of the more affluent one.

The heteronormative notion of family is embedded in many other rules on insurance. For instance, in the Social Insurance Law, the balance in the personal account of the basic endowment pension insurance can be inherited,<sup>24</sup> to which a same-sex partner may not have access without a bequest through a will or a legacy-support agreement.<sup>25</sup> Another example can be found in the Regulation on Work-Related Injury Insurance, where only 'close relatives' of the deceased employee may collect a contribution to funeral expenses and a lump-sum payment for a work-related death, and only 'relatives' to be supported by the deceased may be entitled to a monthly pension.<sup>26</sup> A bylaw has specified the scope of 'relatives', that is, 'the spouse, children, parents, paternal grandparents, maternal grandparents, grandchildren, and brothers and sisters of the deceased employees'.<sup>27</sup> That means one's same-sex dependent survivor is not able to claim any of above-mentioned payments.

Survivor's pension rights have been one of the most frequently litigated issues in the international courts. The United Nations Human Rights Committee (UN HRC) has ruled in two cases that the denial of the same-sex cohabiting partner's access to survivor's pension constitutes sexual-

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22 In the United States, for instance, welfare recipients risk losing important benefits if they marry, suggesting that their caution around marriage is economically rational, see Carol Smart, 'Stories of Family Life: Cohabitation, Marriage and Social Change' (2000) 17 *Canadian Journal of Family Law* 20-53. For the laws in some European Countries, see Kees Waaldijk, *More or Less Together: Levels of Legal Consequences of Marriage, Cohabitation and Registered Partnership for Different-Sex and Same-Sex Partners. A Comparative Study of Nine European Countries (Documents de Travail n°125)* (Institut national d'études démographiques, Paris, 2005).

23 Marriage Law, Article 17; Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Marriage Law of the People's Republic of China (II), issued 4 December 2003, effective 1 April 2004, amended 20 February 2017, Article 11.

24 Ibid, Article 14.

25 See section 5.1.6 and accompanying text.

26 Regulation on Work-Related Injury Insurance (2010 Revision), Article 39.

27 Regulations on the Scope of the Relatives to Be Supported of the Employees Killed in Work-Related Accidents.

orientation discrimination.<sup>28</sup> In these cases, the Committee did not compare same-sex couples with different-sex married couples, but with different-sex partners outside marriage whose right to a survivor's pension is already protected by the national laws. Similar reasoning can be found in the decisions of European courts.<sup>29</sup> In the Chinese context, however, such comparison does not provide a strong argument. Since 1994, different-sex *de facto* marriage has no longer been legally recognized,<sup>30</sup> thus unmarried same-sex cohabiting partners are not likely to be judged to face discrimination if compared to their different-sex counterparts who are also excluded from survivor's pension.

Meanwhile, commercial insurance is no less strict. According to Chinese Insurance Law, same-sex partners are theoretically eligible for purchasing insurance for each other and becoming beneficiaries of the other's life and health insurance.<sup>31</sup> In practice, however, insurance companies often do not allow non-family members to purchase personal insurance or to become the beneficiaries. I approached the customer service departments of two of China's largest insurance companies, both of which insisted that according to their own policies, one is only allowed to purchase personal insurance for one's next of kin, not for one's unmarried partner (whether same-sex or different-sex) or for a good friend, not even with written consent; the candidates for beneficiaries are limited likewise.

Nevertheless, there are ways to bypass such internal policies without contravening the law, according to one insurance company's customer service online. For instance, I was told that one may purchase personal insurance for oneself, and make the beneficiaries statutory successors. After the insurance contract enters into effect, one can make a will leaving the benefits to the testamentary successor, i.e., one's same-sex partner.<sup>32</sup> However, such a pragmatic solution cannot prevent potential disputes between other statutory successors of the ill or the deceased (such as biological family members) and a same-sex partner. Alternatively, accord-

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28 *Young v. Australia*, Communication No. 941/2000, CCPR/C/78/D/941/2000, 18 September 2003, para. 10.4; *X v Colombia*, Communication No. 1361/2005, CCPR/C/89/D/1361/2005, 14 May 2007, para. 7.2.

29 For an overview of the cases in European courts on non-marital relationships, see Kees Waaldijk, 'Great Diversity and Some Equality: Non-Marital Legal Family Formats for Same-Sex Couples in Europe' in Marjolein van den Brink, Susanne Burri and Jenny Goldschmidt (eds) *Equality and Human Rights: Nothing but Trouble?* (Utrecht University, Utrecht, 2015) 223-246.

30 See Chapter 3, footnote 61 and accompanying text.

31 'Personal insurance' in Chinese law is a rather broad concept, which include health insurance, accidental injury insurance, life insurance etc. See Insurance Law of the People's Republic of China (2009 Revision), adopted by Standing Committee of the National People's Congress on 28 February 2009, effective 1 October 2009, Articles 12 (3) and 95.

32 Online conversation with the customer service person, 25 July 2013. The name of the insurance company is intentionally anonymized.

ing to the companies' customer services, they have other financial products available whereby one can designate a non-relative as a beneficiary; a work-around often used by the rich and famous who have mistresses or children born out-of-wedlock.<sup>33</sup> This solution is nevertheless a high-risk high-yield financial instrument, which falls out of our discussion of life and health insurance.

Most of my respondents have not thought about the possibility of receiving a survivor's pension or purchasing commercial insurance for their same-sex partners at all, partly because they do not have faith in a long-term family-like relationship. The lack of recognition in law also makes many of them assume they are simply unprotected regarding social security. Therefore, they are also less aware of both the specific legal restrictions and possible leeway they have.

### 5.1.3 Access to Medical Records

Hospital seems to be one of the places where the discrimination against non-familial relationships is most salient. It is common to hear that that same-sex people are not eligible to obtain their partner's medical records; he or she could not sign the proxy consent form for medical emergencies, either. The different treatment hospitals accord to same-sex partners and different-sex spouses seems to have become one of the most empathetic arguments for same-sex marriage made by gay rights activists the world over, China included. This line of argument is often quite successful, partly because the anxiety of not being able to be taken care of when one gets old and ill strikes a profound chord with a large number of people, straight and gay alike, and thus generates sympathy.

Although same-sex partners do not enjoy all the rights different-sex married couples have where medical care is concerned, Chinese law is probably less oppressive than gay rights activists maintain in a number of hospital-related scenarios. According to the Provisions on the Administration of Medical Records in Medical Institutions, only the patient or his or her entrusted agent is entitled to review and copy the medical records.<sup>34</sup> The entrusted agent needs to provide valid proof of identity of the patient and the agent respectively, the legal proof of proxy relation, and the power of attorney.<sup>35</sup> The difference between the latter two is unclear. According

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33 Ibid.

34 Provisions on the Administration of Medical Records in Medical Institutions, adopted by National Health and Family Planning Commission and State Administration of Traditional Chinese Medicine on 20 November 2013, effective 1 January 2014, Article 17. In Wen and Bin's situation, however, the 2002 version of this regulation should apply, Article 13 of which allows self, entrusted agents, close relatives and insurance companies to access the medical record. In either law, Bin has to prove himself a lawfully entrusted agent.

35 Ibid, Article 18.

to the General Principles of Civil Law, a valid power of attorney can be regarded as the proof of the proxy relation.<sup>36</sup> It is likely that, in practice, hospitals may put up barriers for friends or unmarried (same-sex) partners who want to review the medical records, by requiring marriage certificate or household registration certificate (*hukou*),<sup>37</sup> although it is not a formal requirement in law.

The experience of one male couple, Wen and Bin, illustrates the inconvenience resulting from this lack of legal clarity. In July 2013, Wen suffered a stroke and became hemiplegic. They had not previously established any formal power of attorney, and they did not think to do so at the hospital. It was at that moment that Bin started to realize how disadvantaged they were compared to different-sex married couples. When Bin asked the hospital to show him Wen's medical records, the doctor refused, insisting that only the next of kin had such rights. Bin told the doctor that he was Wen's lover, his family member, his only kin. Indeed, Wen's parents passed away a decade ago, while his siblings were estranged from him after he came out. Finally, the hospital decided to make it an exceptional case and allowed Bin access to the records, without asking him to provide any legal documentation.

The fact that the doctors and nurses made allowances for Wen and Bin suggests that, in reality, there is already some social recognition of same-sex partnerships, even if such an accommodation is against the law. When health or even survival is concerned, and when an individual's vulnerability is laid bare and experienced by those involved, the formal status of a relationship comes to matter less, and the substantial act of care, more. Still, having to resort to sentiment can create more uncertainty, and cannot alter the inferior legal status of same-sex relationships. In this sense, formal recognition is still a pressing need. The next scenario further illustrates this point.

#### 5.1.4 Medical Decisions in Emergency

In addition to accessing one's partner's medical record, proxy medical consent in case of emergency is another issue that provokes tears and empathy. Again, Chinese law is not clear in terms of who is entitled to make such an important decision. According to the Administrative Regulation on Medical Institutions of 1994,

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36 Article 65, General Principles of the Civil Law.

37 Largely based on locality and family background, the *hukou* system serves four main functions: to provide the government with a database of the population, to control the flow of rural-to-urban migration by restricting the change from rural *hukou* to urban *hukou* (or vice versa), to provide a basis for differential resources allocation and subsidization between urban and rural *hukou* holders and to help the police track down individuals and exercise other forms of social control, see Fei-Ling Wang, 'Renovating the great floodgate: The Reform of China's *Hukou* system', in Martin King Whyte (ed) *One Country, Two Societies: Rural-Urban Inequality in Contemporary China* (Harvard University Press, Cambridge, 2010) 335-364.

'When performing an operation, special examination or special treatment, medical institutions must get the patient's own consent, together with the agreement and signature of his or her family member or of a *related person* (*guanxi ren*); if the patient's opinion cannot be obtained, the institutions shall get the agreement and signature of his or her family member or a *related person* ...'<sup>38</sup>

The Regulation does not define the term 'related person', nor does it say if a 'related person' includes closely connected roommates, unmarried partners, friends and so on. Arguably, this term can be understood as broadly as any person who is closely related to the patient, and who will take into account the patient's best interest. Moreover, we could interpret the law textually: as 'related person' is juxtaposed with 'family member', then the two terms implicitly indicate different categories. In fact, when no other family member is present, there have been cases where hospitals interpreted the term 'related' broadly so that it includes the patient's boyfriend.<sup>39</sup>

A reference to comparative law indicates that it is not unrealistic to treat same-sex partners as qualified decision makers in emergencies, without having to first introduce a whole set of formal legal recognition of same-sex partnership. Taiwan, for example, has an official definition of a 'related person' in the event of surgery, which reads;

*'the patient's related person in principle refers to a person with an especially close relationship with the patient, such as cohabitants and close friends; or the obligor according to statutes or contracts, such as guardians, teachers, or firemen...'*<sup>40</sup>

In another instance, the State of New Mexico in the United States has provided in 1978 a default setting for urgent decision making, if the patient is unable to make a decision and if a designee is absent. The possible surrogate decision-maker can be (in descending order of priority):

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- 38 See Administrative Regulation on Medical Institutions (医疗机构管理条例), issued by Ministry of Public Health on 26 February 1994, effective 1 September 1994, Article 33.
- 39 A case in 2007 concerning the medical decision by the long-term male partner of a pregnant woman indicates that unmarried partners can be deemed as a 'relative', (although the focus of this case was not whether he is the lawful person to make such decision, but his refusing to consent the surgery, which led to the death of the patient). For the details of and comments on the case, see Lixin Yang, 'Tort Liability for Medical Treatment Administration: What Law to Be Applied (医疗管理损害责任与法律适用)' (2012) 3 *Jurists* 30-35.
- 40 Guiding Principles on Obtaining Patients' Consent to Surgery and Anesthesia at Medical Institutions (医疗机构施行手术及麻醉告知暨取得病人同意指导原则), Notice No. 0930218149, Department of Health, issued and effective 22 October 2012.

'the spouse, an individual in a long-term relationship of indefinite duration with the patient in which the individual has demonstrated an *actual commitment* to the patient similar to the commitment of a spouse and in which the individual and the patient consider themselves to be responsible for each other's well-being, an adult child, a parent, an adult brother or sister and a grandparent.'<sup>41</sup>

A similar provision can be found in Norway's Patients' Rights Act, which defines the patient's next of kin as:

'the person whom the patient names as his or her kin or next of kin. If the patient is incapable of naming his or her next of kin, the next of kin shall be the person *who to the greatest extent has had lasting and continuous contact with the patient*....'<sup>42</sup>

The rationale in the above laws is that substantive caring relationships, in emergency scenarios, should transcend the conventional definition of 'family' in law. This is also more consonant with the purpose and ethics of the surrogate medical decision system, namely, to make decisions as close as possible to the patient's own wish.<sup>43</sup>

In practice, there have been no reports in China of same-sex partners invoking the 'related person' provision to claim the right to make a surrogate medical decision, and no activist has pushed the hospital or the judicial or legislative authorities to make clear the scope of what constitutes a 'related person'. Meanwhile, the reality appears more flexible than the law. A volunteer in a male-to-male sex worker NGO told me that he has several times in emergencies signed the medical consent form concerning HIV-positive male sex workers. In these urgent scenarios, contrary to what my legal training prepared me to expect, not only did the hospitals not bother asking him to show proof of next-of-kinship or power of attorney, but they actually urged him to sign the form for the patient. 'I took no time to think or hesitate at all. I felt huge responsibility the moment I signed it', he said. In two other similar situations, according to him, neither the patient in a coma nor the social workers signed the consent form, but the hospital carried out the surgery straightaway.

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41 See *Uniform Health-Care Decisions Act*, NMSA 1978, New Mexico, the United States, Section 24-7A-5, Article B (2). Moreover, according to the Article C, if the family members are unavailable, 'an adult who has exhibited special care and concern for the patient, who is familiar with the patient's personal values and who is reasonably available may act as surrogate', thereby covering more people outside the original or conjugal family of the patient. For more jurisdictions in the United States and some other countries that have similar rules, see Nancy D Polikoff, *Beyond (Straight and Gay) Marriage: Valuing All Families Under the Law* (Beacon Press, Boston, 2008) 110-123, 159-174.

42 The Act of 2 July 1999 No. 63 relating to Patients' Rights (the Patients' Rights Act), Norway, effect 1 January 2001, Section 1-3 (b), at [www.webcitation.org/6s8IvVG19](http://www.webcitation.org/6s8IvVG19).

43 Polikoff calls this approach 'valuing all families': 'The most important element in implementing this approach is identifying the purpose of a law that now grants marriage unique legal consequences. By understanding a law's purpose, we can identify the relationships that would further that purpose without creating a special status for married couples', in Polikoff, *Beyond (Straight and Gay) Marriage* (2008) 5.

A lesbian activist respondent was also of the opinion that the account given by the gay rights campaign on medical decision-making in media was over-sensationalized, because she had successfully signed the paper for a colleague of hers, just by saying she was the patient's older sister:

'In practice, most of the time hospitals would not ask you to provide your *hukou* to see if you two really are sisters; moreover, if a sibling has migrated to another place together and changed her *hukou* certificate accordingly, then it would be almost impossible to prove the kinship in a short period of time. They can't have a DNA test on the spot, can they?'

Many same-sex-oriented people had considered straight-passing by acting as a sibling, too, as illustrated by their contributions at the workshops I organized or the meetings I participated in. However, one participant expressed a valid concern:

'It's one thing to lie and to sign the paper in an emergency, but it's another if the surgery fails and if his or her "real relatives" later show up and insist that you had no legal competence to make that decision and that you should face civil or even criminal liability.'

Indeed, when the law does not clearly grant surrogate decision-making rights to same-sex partners or dependents other than the next of kin, disputes are more likely to happen afterwards, although as yet there are no reported cases. Again, ambiguity in law brings more space for interpretation but concomitantly also uncertainty and troubles.

### 5.1.5 Living Organ Transplantation

Like the 'related person' provision, Article 10 of the Regulations on Human Organ Transplantation seems to have opened another door for close same-sex relationships. It provides,

'The recipient of a living organ shall be limited to the spouse, lineal relative by blood or collateral relative by blood up to the third degree of kinship of the living organ donor, or a person who is proved to have *developed a familial relationship* with the living organ donor for reasons such as *assistance and support*'.<sup>44</sup>

'Familial relationship' here should be interpreted as more than marriage and biological kinship, because the words 'developed' and 'assistance and support' have suggested that kinship is not necessarily premised on conjugal or blood ties. It can be established and nurtured by daily interaction. The recognition that it is possible for someone to 'develop' a familial relationship with someone else could be particularly significant for same-sex partners wanting to claim rights for their chosen families.

44 Regulation on Human Organ Transplantation (人体器官移植条例), adopted 21 March 2007, effective 1 May 2007, Article 10. The original Chinese text of the last part of the provision is '有证据证明与活体器官捐献人存在因帮扶等形成亲情关系的人员'.

The Regulation does not make clear what counts as having ‘developed a familial relationship’, so the purpose of the law should be considered when we interpret it.<sup>45</sup> The primary purpose of restricting the scope of recipients of human organ transplantation is to prevent the commercial trade in organs and to encourage altruistic donation. If there is no evidence of a transactional trade, then ‘familial relationship’ should be interpreted in each individual context, for the best interest of organ recipients. Therefore, the law should not exclude those closely attached same-sex partners who care and support each other just as some married spouses or legal family members would. The Finnish Act on Medical Use of Human Organs and Tissues takes this approach, where the recipient of a living organ donation must be ‘a near relative’ or ‘other person close to’ the donors,<sup>46</sup> and the latter is thought to cover some same-sex (and different-sex) cohabiting couples.<sup>47</sup>

Nevertheless, the interpretation of this provision in real-life cases can be controversial. In 2008, two unacquainted recipients in a same hospital happened to match with donors from each other’s families. The hospital’s medical ethics committee considered such a ‘cross donation’ to be legal and ethical, but did so without discussing whether these two families had, though an empathic understanding of their shared distress, ‘developed a familial relationship’ and from a desire to help reciprocally.<sup>48</sup> It reasoned only that ‘this case is not a commercial organ transaction, so the cross donation is not against the intention of the regulation’.<sup>49</sup>

In 2009, however, the Ministry of Health issued detailed guidelines about the implementation of the Regulation on Human Organ Transplantation, where it strictly confined the scope of what is meant by ‘developed familial relationship’ to the relationship ‘between parents and adopted children, or between stepparents and stepchildren.’<sup>50</sup> That meant that same-sex couples would subsequently find it harder to insert themselves within this narrow definition, but there is still a chance that in practice the medical ethics committee may give an exception for altruistic donation between them.

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45 See above, footnote 43.

46 See No. 101/2001 Act on the Medical Use of Human Organs and Tissues of Finland, issued 2001 February 2, effective 2001 September 1, Article 4 (1), at [www.webcitation.org/6s4SgU8GI](http://www.webcitation.org/6s4SgU8GI).

47 See Rainer Hultunen and Kees Waaldijk, ‘Major Legal Consequences of Marriage, Cohabitation and Registered Partnership for Different-Sex and Same-Sex Partners in Finland’, in Waaldijk, *More or Less Together* (2005) 87.

48 “The background and effects of the Ministry of Health’s decision on the legality of cross kidney donation” (卫生部认定交叉换肾合法的前前后后) *Legal Daily*, 2008 June 16, at [www.webcitation.org/6qYwDXs78](http://www.webcitation.org/6qYwDXs78).

49 Ibid.

50 See Several Provisions of the Ministry of Health on Regulating Living Organ Transplantation (卫生部关于规范活体器官移植的若干规定), issued by Ministry of Health on 2009 December 28, effective 2009 December 28.

Regretfully, the Ministry of Health could have encouraged a case-by-case approach when interpreting the regulation, so as to strike a balance between the open-endedness of Article 10 and the need to prevent human organ transaction. Issuing guidelines to exclude opportunistic behavior among non-family members may serve the latter purpose, but the narrow definition of ‘developed familial relationship’ directly disadvantages all valuable relationships other than those found within the bounds of the formal heterosexual family unit.

### 5.1.6 Succession

Succession is another issue that is conventionally tied to biological and affinitive kinship. Chinese law identifies three distinct types of succession: 1) intestate or statutory succession (*fading jicheng*) is the default equal attribution of the inheritance, the beneficiaries of which include only a surviving spouse, children, parents, brothers and sisters, paternal grandparents and maternal grandparents; 2) testament (*yizhu jicheng*) is a will that specifies that one or more of the *statutory* beneficiaries should inherit one’s personal property in the personalized order and amount; and 3) a will to donate (*yizeng*) is for the benefit of the state or a collective, or of persons *other than* the statutory successors.<sup>51</sup> It is also stipulated that any property left with neither an intestate successor nor a legatee would become the property of the state or a collective.<sup>52</sup> In addition, people other than a successor who were largely responsible for supporting the deceased, or who had depended on the support of the deceased and can neither work nor have a source of income, may secure ‘an appropriate share’.<sup>53</sup> In practice, the term ‘non-legal successors’ is commonly understood to refer to a daughter- or son-in-law.<sup>54</sup> The legislative and judicial interpreters have not considered the situation of same-sex unmarried partners, close friends, or other caregivers or receivers yet, and there has not yet been any legal court case in this regard. Therefore, timely drafting a will is of greater importance for same-sex partners.

One of the best-known American movies amongst Chinese *tongzhi* communities is *If These Walls Could Talk 2*, in which an elderly lesbian woman is chased out of her deceased partner’s house by her partner’s children. This story, set in the United States, has considerable resonance among Chinese same-sex-oriented people, who worry that even if their partners leave a will to donate their properties to them, their statutory successors might still come forward and challenge it in court, in name of public order

51 Chinese Law of Succession, Article 10, emphasis added.

52 Ibid, Article 32.

53 Ibid, Article 14.

54 See e.g., *Li v. Tao and Tao*, Weihai Intermediate Court, Shandong, No. 316, 8 June 2015 (李某与陶某甲、陶某乙法定继承纠纷案, 山东省威海市中级人民法院 (2015) 威民一终字第316号).

and good mores (*gongxu liangsu*).<sup>55</sup> Their concern is not unfounded, because there has already been a controversial case 15 years ago concerning an inheritance dispute between the wife and the extra-marital female lover of a deceased man. In that case, the court disregarded his will that gave most of his property to the lover who was the primary caregiver in the last stage of his life. It instead chose to protect the solemnity of marriage and decided that the wife should inherit his property.<sup>56</sup> It is likely that Chinese courts would do the same today when dealing with a dispute between a straight spouse and a same-sex partner of a deceased person. In case of a remote relative versus a same-sex partner, priority may be given to either party with different justifications, depending on the discretion of the judges.

Theoretically, however, one other provision in the Law of Succession could be used to give priority to a (same-sex) partner over statutory successors. Article 31 provides:

A citizen may enter into a legacy-support agreement with a person who, in accordance with the agreement, assumes the duty to support the former in his or her lifetime and attends to his or her interment after death, in return for the right to a legacy.

The legacy-support agreement has an advantage: in the event that the agreement contradicts the testament or the intestacy rules, priority should be given to the agreement.<sup>57</sup> The rationale is, according to civil-law jurisprudence, that the act of caring has made the partner a creditor, and the creditor's right should precede the statutory or testamentary inheritance rights. In practice, I have not yet encountered any same-sex couples who were aware of this provision or had made use of it, nor has any contesting of the legality of such an agreement in court been reported.

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55 Notice that in Chinese law, there is no mandatory proportion of legacy reserved for the spouse or minor child. It is only stipulated that 'reservation of a necessary portion of the property shall be made in a will for a successor who neither can work nor has a source of income', see Chinese Law of Succession, Article 19. What amounts to 'necessary' is unwritten, so theoretically a person can lawfully bequeath most, if not all, property to a non-relative, if his or her statutory successors can be self-sustaining.

56 In this renowned case, a man left his inheritance to his lover who took care of him before he died instead of his wife, but the court annulled the will, considering it as contravening public morality. See *Zhang Xueying v. Jiang Lunfang*, Luzhou Intermediate People's Court, Sichuan Province, 28 December 2001, No. 561 (张学英诉被告蒋伦芳遗赠纠纷民事判决书, 四川省泸州市纳溪区人民法院 (2001) 纳溪民初字第561号).

57 See Opinions of the Supreme People's Court on Several Issues concerning the Implementation of the Law of Succession of the People's Republic of China (最高人民法院关于贯彻执行《中华人民共和国继承法》若干问题的意见), issued and effective 11 September 1985, Article 5.

### 5.1.7 Continued Tenancy

The right of a surviving same-sex partner to continued tenancy is also a matter of concern. This issue has been adjudicated in some Western countries. In *Karner v. Austria*, for instance, the European Court of Human Rights found that the abstract aim of protecting the traditional family could not justify the exclusion of same-sex surviving partners from the right to succeed to a tenancy held by the deceased, and that such an exclusion is therefore a prohibited form of discrimination.<sup>58</sup> The same-sex partner of the deceased is likewise protected from eviction by the landlord in the United States, following the landmark *Braschi* case.<sup>59</sup>

In comparison, the statutory rules on continued tenancy in Chinese law already seem to protect same-sex couples. According to Article 234 of the Contract Law,

‘Where the lessee is deceased during the term of a dwelling unit lease, *the person jointly living in the unit with the lessee* while the lessee is alive may continue leasing it on the terms of the original leasing contract.’<sup>60</sup>

This provision does not require the cohabitants to be spouses or close relatives, nor does it oblige them to live together for a fixed period of time.<sup>61</sup> There have been no reports or legal cases concerning the sudden loss of home by a different-sex or same-sex cohabiting partner of a deceased lessee in China. Whether same-sex partners face practical problems remains under-researched, yet this provision seems to be invocable to contest any discrimination on the landlord’s part.

Continued tenancy of public housing, where the specific bylaws may override Article 234 of the Contract Law, is nevertheless more problematic in some places. For instance, according to the bylaws of Shanghai’s department of housing management, if the original tenant dies, the cohabiting person who applies to continue the contract must have a local *hukou* (residence permit), otherwise the tenancy should be inherited by the spouse or

58 *Karner v. Austria*, Application No. 40016/98 para 41, Judgment, ECtHR (2003), para 41.

59 *Braschi v. Stahl Assocs. Co.*, New York Court of Appeals, United States, 543 N.E.2d 49, 53 (N.Y. 1989).

60 Contract Law of the People’s Republic of China, adopted 15 March 1999, effective 1 October 1999, Article 234, (emphasis added); the same content also appears in Article 12 of the Administrative Measures for Commodity House Leasing (商品房屋租赁管理办法), Order No.6 of Ministry of Housing and Urban-rural Construction, issued 1 December 2010, effective 1 February 2011.

61 Notice that in a 1995 regulation, which has been replaced by the Administrative Measures for Commodity House Leasing, it was required that the tenancy could be continued only when the cohabitants are ‘family members’ jointly living ‘for more than two years’. See Administrative Measures for House Leasing in Cities (城市房屋租赁管理办法), Order No.4 of Ministry of Construction, issued 9 May 1995, effective 1 June 1995, invalidated 1 February 2011. Before its repeal, this provision is in fact in conflict with the Contract Law of 1999. It is unclear which of the two laws was prioritized in practice.

next of kin of the deceased who are locals.<sup>62</sup> As same-sex partners are not considered relatives, they cannot register as part of the same household. Obtaining Shanghai *hukou* via marriage, which is available for different-sex couples, is impossible for a same-sex partner or friend whose *hukou* is in another place. On the other hand, if the surviving same-sex partner does have a local *hukou*, he or she is able to continue the tenancy for public housing, at least in Shanghai. In general, however, the rules controlling residence and immigration draw on marriage and kinship laws to create different classes of citizen and kinship.

### 5.1.8 Summary

Chinese law does protect elderly people in several aspects, including the freedom to marry, rights to social insurance, health-related rights and the rights of the surviving partner. For the unmarried, however, their dependents or care-giving partners are likely to be accorded fewer legal rights and benefits, including being the beneficiary of one's partner's life or health insurance, or accessing the partner's medical record. On the other hand, there are sporadic rights and benefits that implicitly protect subjects and relationships 'beyond marriage',<sup>63</sup> including the individual-based medical care system in China, the right of the 'related person' to make surrogate medical decisions in emergencies, the right to living organ donation between those who have 'developed a familial relationship', the right of non-relative caregivers to succession via legacy-support agreements, as well as the right to continued tenancy of non-relative cohabitants. These laws are not necessarily the results of an intentional de-centralization of marriage or of an intention to protect gay rights, but perhaps these inclusive terms are used simply because human relations are much more complicated than marriage and biological kinship, and thus some flexibility in law could better suit the reality.

In daily scenarios, however, Chinese same-sex-oriented people do not turn to laws for guidance on how to live or to plan for their old age. More often than not, just like most heterosexuals, they do not bother to check the law books before they think and act. However, insidious unfairness presents itself most obviously when people 'bump into it', as illustrated in the cases mentioned above. These legal rules do work latently to shape people's sense of old-age security, together with the cultural-political-legal environment that has led to care being increasingly privatized and filial piety being further promoted. As shown next, the highlighting of filial piety in law and party-state propaganda has stimulated same-sex-oriented people to forge new meanings to it.

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62 See Shanghai Regulations on Residential Tenancy (上海市居住房屋租赁合同管理办), adopted 27 December 1999, revised 18 September 2010, Article 41.

63 See below, footnote 122 and accompanying text.

## 5.2 FROM FILIAL PIETY TO NON-HETERO-FAMILIAL CARE

Existing studies have demonstrated that the essential elements of filial piety in Chinese society include respect, obedience, and the obligation to provide for elderly parents.<sup>64</sup> In an ideal scenario, a happy old age should include economic security, solid support (both emotional and practical), physical adjacency with one's offspring, and pleasurable social life. For same-sex-oriented people, however, it is difficult to make their parents wholly happy unless they put on the straightjacket. For those who try to strike a balance between their filial duties and their intimate life, it is necessary to disassemble filial piety into distinct parts and reassemble them. Meanwhile, parents of openly lesbian or gay children are also adjusting their expectations of filial piety. All these changes are reshaping people's understanding of who should take care of the elderly and how.

### 5.2.1 To Obey or to Care?

With the growth of neo-liberalism and the accompanying encouragement of individual (sexual) desires in China,<sup>65</sup> many same-sex-oriented, especially LGB-self-identifying, people are now reluctant to simply obey their parents' wish for them to follow a 'smooth' path through life. They have tried to separate the two Chinese characters that are combined to mean filial piety, *xiao* (care) and *shun* (obedience), and insist being '*xiao er bu shun*' (caring but not obedient), namely, caring for the parents without being submissive to them. As Tata,<sup>66</sup> a lesbian who has written several popular articles and given workshops on coming out and intergenerational relationships, said,

'If filial piety harms the children, then it is sheer blind loyalty (*yu xiao*). I prefer *xiao er bu shun*, where the care for the elderly is not premised on the sacrifice of their offspring's integrity. We can always have our own ways of doing *xiao*, not necessarily by getting married and having kids as our parents designed for us. Only when we are mature and independent enough could filial piety become a free choice; otherwise it's simply out of moral pressure.'<sup>67</sup>

She further explained,

'After I came out, my parents were so furious that they even claimed they would disown me. I would never leave my lover just in order to please them, but I still provide for them regardless of their attitudes, visit them regularly, and took care of my father when he was hospitalized. This is my way of practicing filial piety: coming out toughly and taking care softly.'<sup>68</sup>

64 Judith Stacey, *Patriarchy and Socialist Revolution in China* (University of California Press, Berkeley, 1983); Lung-kee Sun, 'Contemporary Chinese Culture: Structure and Emotionality' (1991) 26 *The Australian Journal of Chinese Affairs* 26, 1-41.

65 Rofel, *Desiring China* (2007) 143.

66 This is a name known in the LGBT self-help community in China.

67 Tata, story-sharing event at PFLAG, Guangzhou, 26 July 2014.

68 *Ibid.*

Like Tata, more and more same-sex-oriented young adults now embrace this liberalistic understanding of parental-child relationship, which is based on the modern assumptions that parents and adult children are equal individuals with the same rights as citizens, and that the former should not have the authority over the latter's choices of intimate life.<sup>69</sup> Although some authors point out the nuances in the ways of negotiation within Chinese families compared to the West,<sup>70</sup> a general trend of the democratization of parent-child relationship is increasingly noticeable in China today.

In other words, young people now seem to be more courageous and decisive to disobey, or at least bargain with, the submissive (*shun*) demand of filial piety. Then the most important element of *xiao* becomes elderly care, which includes economic, physical, mental and social dimensions all at once – an onerous task still. It can also involve enormous affective labor if the parents do not accept the children's coming-out and insist obedience instead. No wonder plenty of same-sex-oriented people remain skeptical and anxious even though activists like Tata try to convince them that they can be both gay and filial. After all, coming out needs courage, while being filial requires material resources, and those are oftentimes intertwined. To 'come out toughly and take care softly' as Tata did might be luxurious for a person in a harder living condition.

For many of those who fear that coming out would be hugely destructive of their harmonious family life,<sup>71</sup> entering into a cooperative marriage is a more socially and economically affordable way to honor obligations of filial piety. By getting married, as their parents always wished, they show their belief in the unassailable importance of obedience or *shun* in a peaceful intergenerational relationship. By living a straight-looking life themselves, they also guarantee their parents an 'ordinary', peaceful life, saving their elders from being judged by their gossipy peers over their children's being single and childless. As cooperatively married couples often live far away from their parents, their *prima facie* obedience (such as occasional calls and visits) often outweighs the actual caring aspects of filial piety, to such an extent that it seems to be *shun er bu xiao*, obeying without caring, the opposite of Tata's deconstructed filial piety. Let us revisit the sample contract provided by Xiong's matchmaking group:

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69 For the transformation of intra-family relationship in the Western contexts, see Anthony Giddens, *The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Societies* (Stanford University Press, Stanford, 1992) 42; Ulrich Beck, 'Democratization of the Family' (1997) 4 *Childhood* 2, 151-168.

70 See e.g., Xiaohui Zhong and Sik-ying Petula Ho, 'Negotiative Intimacy: Expectations of Family Relationship and Filial Piety among Only-Child Parents' (2014) 1 *Open Times* 155-175.

71 For more analysis of this concern, see Yip Lo Lucetta Kam, *Shanghai Lalas: Female Tongzhi Communities and Politics in Urban China* (Hong Kong University Press, Hong Kong, 2013) 76.

'During marriage, one party shall, under the principles of equality and free will, provide reasonable help to maintain the spousal relationship, for instance, visiting the other's parents regularly and participating in the other's family events... unless agreed otherwise, neither party is obliged to support the other's parents.'<sup>72</sup>

Such an agreement is not invalid. In China, the daughter- or son-in-law is not obliged, under the Marriage Law and the Law on Succession, to be a career. It is only in the Elderly Protection Law that it's stipulated 'the spouses of the supporters shall *assist* them in fulfilling their obligations to provide for the elderly'.<sup>73</sup> The obligation to assist is more of a moral one, and there are very few cases where an elderly parent has invoked this provision against a daughter- or son-in-law.

In terms of social expectations, however, daughters- or sons-in-law should visit and give gifts or money to the elderly in holidays, festivals or on their birthdays. Some cooperatively married couples have their own ways of navigating filial obligations: as Fish, a lesbian respondent in Xi'an, said, she would reimburse her gay husband before or after he gave the gift money to her parents.<sup>74</sup> In this way, they manage to keep their financial independence while pleasing the elders.

Hence the duty to be obedient as a child (and child-in-law) is further broken down into two main aspects – providing gift money and paying visits on special occasions, both of which symbolize respect for generational hierarchy in an extended family, while also honoring the economic and emotional caring obligations. Notice that the 'superficial' aspects of visiting and money-giving in cooperative marriages are not uncommon in a 'normal' heterosexual marriage, where the in-laws do not necessarily have strong attachments but still carry out these socially-meaningful activities. This again demonstrates that filial piety is not always a spontaneous, altruistic human sentiment, but a repetitious 'doing' of kinship.<sup>75</sup>

However, it is inaccurate to say that filial piety in cooperative marriage is simply 'fake' because there is no substantial caretaking. In fact, *xiao* and *shun*, obedience and care, are hardly separable in everyday life. In some cases, caring familial feelings can develop in the very repetition of 'acting the part of a responsible child or child-in-law'. As Fish recalls,

'Although I'll always return the large amount of gift money to my gay husband after he gives it to my mom, he insists on giving some practical small gifts to them as a way to express his gratitude for my cooperation and my parents' kindness. When the earthquake happened in 2008, I was on a business trip. He said his first reaction was to call his own

72 Sample Cooperative Marriage Contract, Article 7, text provided in Chinese. More discussion about the terms and conditions of this sample contract can be found in Section 3.3.1.

73 Law on Protection of the Elderly, Article 14 (3).

74 Interview with Fish, 6 May 2014.

75 David M Schneider, *A Critique of the Study of Kinship* (University of Michigan Press, Ann Arbor, 1984); Judith Butler, 'Is Kinship Always Already Heterosexual?' (2002) 13 *Differences* 14-44.

parents, and after they said they were fine, he immediately drove to my mother's and brought her to his place lest she should not dare to be alone. So, you can't say that we don't have any feelings of kinship (*qin qing*), although we don't love each other like other husbands and wives.'

The stories of Tata and Fish diverge enormously in terms of how an adult child should practice filial piety towards their parents, but a common implication is that the notion of filial piety is being deconstructed and reconstructed to customize it to individual needs and circumstances in contemporary China. When same-sex-oriented people do not get along with their parents (either because they are in the closet or their coming-out is not accepted), they may not be able to provide emotional intimacy or day-to-day practical care. In such cases, they tend to emphasize the monetary aspect of filial piety, as we saw in Tata's story. Or, like Fish and other cooperatively married couples, they downplay their sexuality and emphasize the importance of familial harmony, legal convenience and social decency. Interestingly, they both think the other life choice unimaginable and unfeasible for themselves. If taking a step back, however, we can see that it is the coexistence of such conflicting beliefs and practices that are together questioning the impossibility of the heteronormative old-age ideal.

Importantly, there is no monolithic model of 'Chinese parents', as if they are all passively waiting for both obedience and care. Their expectations of the path their children take and their own plans for elder life can vary considerably as well, as the following section shows.

### 5.2.2 PFLAGs' Vision of Late Life

In concert with the liberalistic understanding of filial piety, the non-profit organization PFLAG (Parents and Friends of Lesbians and Gays) China aspires to encourage Chinese parents to be less possessive or manipulative, and more 'democratic' (*kaiming*) with regard to their children's sexuality and life choices. One of their most important arguments is that truly loving parents would never selfishly prioritize their own face, while sacrificing their children's happiness. In particular, PFLAG parents are encouraged to be 'strong in their own hearts' (*neixin qiangda*)<sup>76</sup> and preferably financially self-sustaining, as opposed to simply hoping that their children will feed them as they get older.

Papa Lin was one of the very few PFLAG fathers I met in the course of my fieldwork in 2014, who was openly supportive of his gay son. I asked about his plans for later life. He did not express too many concerns, because he and his wife have some savings and do not have to rely on their son's financial support. Plus, 'my son has a very rich partner', he said proudly.

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76 The individualistic rhetoric of gaining inner strength is also used by many openly gay people; See Chapter 3, footnote 84.

Each month, the 'son-in-law' provided his partner's parents with a large living allowance, which is probably one of the reasons why Papa Lin found it easier to accept his son's homosexuality than less affluent families might.

Nonetheless, Papa Lin was still facing enormous pressure from his own elderly parents. His son's grandparents were the only two people in the whole extended family who were excluded from the secret. Papa Lin had often encouraged them to move from their village to live in the apartment he had bought in town, but they cared more about their grandson than their own life quality. They insisted that the new apartment should be the honeymoon home for their grandson who might be married soon. They also worried it would be inconvenient if living with their son, daughter-in-law, grandson, future granddaughter-in-law, and perhaps great-grandchildren. Their concept of family rests deeply on the ideal of 'four generations living under the same roof' (*sishi tongtang*), which is nonetheless no longer the only path to happiness in the eyes of the younger generations.

The way Papa Lin dealt with the pressure to carry on the family line and to meet his elderly parents' expectation was to push his son to have a child, even though he accepts his son's sexuality. Without finding it contradictory, he insisted that this be his son's primary obligation:

'I don't care if he gets married with a woman or not, but since he and his partner are well off, he must do surrogacy. This is a must. Why? At least I need my life to be continued. I am the oldest son in my family, and he is the oldest grandson; we both have the responsibility to continue the family blood-line.

All he needs to do is to have a surrogated child. He does not even have to throw a wedding party in our hometown. We can just explain that he's already divorced. These days, getting divorced is a common-or-garden event anyway; who cares! Being childless? No-no. Having a child will make life much easier, both for me and for him.'

Emphasizing male responsibility, Papa Lin also complained,

'I really want to say bad words to some PFLAG moms who say they don't care if they have grandchildren or not, as long as their children are happy. I was really pissed off at their attitude. I bet few people will agree with these moms; it's impossible not to expect to have your own grandchild. They just cannot understand the pressure men have!'

Papa Lin's words may partly explain why the open PFLAG mothers far outnumber their male counterparts.<sup>77</sup> Mothers, at least those who have become leading PFLAG activists, seem to accept their children's unmarried and childless life more easily than their husbands do, probably because they do not experience the same patriarchal pressure to continue the family line. Also, once they accept their children's homosexuality, their conception of their own happy old age becomes less obsessively dependent on having obedient children who can give them grandchildren. As a result, many of them started enjoying the role of 'cool mother' (*chao ma*): cultivating new

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77 Another possible reason is the gendered retirement ages, see Chapter 1, footnote 36.

hobbies such as drawing, baking or dancing, travelling alone or as a group to other provinces in China while undertaking PFLAG advocacy on the way, and even hanging out in local gay and lesbian bars and clubs. They are also more outspoken about sex than their peers. Mama Romance<sup>78</sup>, for instance, an activist who has a gay son, has also been active in a number of *tongqi* groups online, encouraging those wives to pursue sexual pleasure with heterosexual men who appreciate their bodies more, other than mourning for their sexually unsatisfied marriage with a same-sex-oriented husband.<sup>79</sup> Mama Jasmine<sup>80</sup> runs a sex toy shop with her lesbian daughter. As time passes, more and more open-minded fathers are coming forward as well.<sup>81</sup>

The national and local PFLAG groups, both online and offline, have given those moms and dads an important sense of belonging, which effectively re-focuses them away from the social expectation for them to become grandparents. Social events within PFLAG communities also work to make them worry less about the lonely life without grandchildren they may have imagined. Some PFLAG members have come up with the idea of a special rainbow nursing home for PFLAGs. Presumably heterosexual, such parents may not necessarily confront homophobia directly in a 'straight' nursing home, but they do not want to face the possibility of their fellow residents making pejorative judgments about their children. Also, because many PFLAG parents have developed certain kinship feelings towards their 'brothers and sisters' through their story sharing, day-to-day online group chatting, regular meetings and travelling around, they find it more comfortable to stay with one another than to spend their old age with strangers with whom they have no common topics.

Admittedly, the PFLAG activists cannot represent all parents of open or closeted lesbian and gay children in China. In fact, many of them are relatively privileged in terms of their education level, urban upbringing, stable income and the ability to access LGBT-positive information online. Moreover, the mutual support and encouragement of PFLAG communities around China gives them an easier starting point from which to unlearn their conventional understanding of filial piety than many other middle-aged parents have. Their chances to talk to young LGBT activists in and outside China also help them to become less patronizing and more carefree. Not all parents have these resources indeed. However, the shifting mentality of these few parents and their efforts in advocacy at least hint at a changing notion of eldercare that no longer depends solely on one's offspring. As we will see next, such changes are more obvious in same-sex-oriented people's own imagination of eldercare.

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78 She uses this nickname in several online and offline public occasions and I do not further anonymize her.

79 Participant observation in a *tongqi* group on 7 July 2014.

80 Ibid.

81 See e.g., the documentary *Papa Weifeng*, directed by Fan Popo, at [www.webcitation.org/6nvZqY8pz](http://www.webcitation.org/6nvZqY8pz).

### 5.2.3 Imagining Non-Hetero-Familial Modes of Elderly Care

As many same-sex-oriented people have experienced the unwanted pressure of filial obedience, they are more likely to think that their children, if they have any, should not be subjected to them. They also tend to believe that one should not have children simply to feel more secure in old age. On the one hand, such belief provokes more anxiety about ageing and dying alone, but on the other hand, it also encourages them to imagine an alternative old age outside the straightjacket of marriage, parenthood and intra-familial eldercare.

Ah-Shan<sup>82</sup> is an amiable, energetic *tongzhi*-identifying activist based in Guangzhou. He had just passed retirement age (60 for male, 55 for female) when I met him in 2014, and he joyfully showed me the city's free public transport card for the elderly. Ah-Shan remained unmarried his entire life. He never told his family his sexual orientation but, in the years before his parents passed away, only took his partners back home to have dinner with them – a typical 'coming home' scenario.<sup>83</sup> Like many Chinese gay men who are 'well identified but not coming out'<sup>84</sup>, Ah-Shan believes his parents might have tacitly accepted his sexual orientation and lifestyle.

In a gathering organized by an NGO called the Gay-Straight Alliance, some young men asked Ah-Shan for advice about how same-sex-oriented people should plan for their old age. His answer reflects the pressure to be individually, financially responsible in an economically neo-liberal China:

'In my opinion, it is pointless to plan your late life too early – how can we predict the rapid changes of life and society? Financial security is necessary, though. I did not have much saved in the 90s, but from then on, I started to pay basic social endowment insurance premiums and medical insurance, which is helpful now. However, I regret that I didn't purchase any commercial insurance, since the basic one is far from enough to make your ends meet considering inflation these days. I highly recommend young *tongzhi* buy commercial insurance, and learn about personal banking.'

82 Ah-Shan is an activist in Guangzhou, and this is the nickname well-known in the community.

83 The strategy of 'coming home' instead of coming out has been discussed in Wah-Shan Chou, *Tongzhi: Politics of Same-Sex Eroticism in Chinese Societies* (Haworth Press, New York, 2000). However, Chou's theorization has the danger of essentializing Chinese culture and underestimating the silent form of homophobia. For different opinions, see de Kloet Jeroen, 'Gendering China Studies: Peripheral Perspectives, Central Questions' (2008) 22 *China Information* 2, 195-219; Wang Yiran, 'The Coming Out Choices and Experiences of Young Beijing LaLas (Lesbians)' (Degree Thesis of Master of Philosophy at Beijing Normal University, 2012; Nai-Fei Ding and Jen-Peng Liu, 'Reticent Poetics, Queer Politics 含蓄美學與酷兒政略' in Nai-Fei Ding, Jen-Peng Liu and Amie Parry (eds) *Penumbrae Query Shadow: Queer Reading Tactics* (Center for the Study of Sexualities, National Central University, 2007) 1-5.

84 See Qingfeng Wang, 'Well-Identified but Not Coming out: Contemporary Gay Minority Investigation' (2011) 28 *China Agricultural University Journal of Social Science* 142-153.

When asked how he would meet the needs of daily care and emotional support when he got even older, Ah-Shan came up with a number of ideas, which supplemented the individualistic approach:

'For me, living with a bunch of gay friends is quite a good idea. I don't want to go to a nursing home that mostly accommodates straight people, since I would feel bored, and I might have some unpleasant encounters if I came out there.

There are government-subsidized "rainbow nursing homes" abroad. If it's hard to obtain subsidy from the government, we may also persuade pink-economy investors to build commercial rainbow nursing homes.'

Ah-Shan realizes full well the socio-economic privileges behind the idea of rainbow nursing homes. He expressed concerns that such places may only help rich, openly gay elders. One could imagine that a less well-off, closeted elderly person, imaginably, would not dare ask their children to send them to a 'gay' place, which is tantamount to coming out and could conceivably bring troubles and shame to their family. Likewise, a lesbian activist Yushi, who had also thought of establishing a rainbow nursing home a decade ago, explained that what stops her from doing so was not the lack of financial or human resources. Laws and policies are not unfavorable, either, because in some cities the governments even offer tax-breaks and subsidies to encourage private nursing homes. Instead, said Yushi, the main problem is that there is not currently sufficient demand:

'Most elderly *tongzhi* have been married and have their own offspring to take care of them. Perhaps only when those who were born after the 1970s and came out after the 1990s get old will the needs of *tongzhi* to age in a friendly mutual-help community with professional care become more salient.'<sup>85</sup>

Therefore, it seems that a commercial or non-profit rainbow nursing home may not be very realistic in the near future. Ah-Shan envisaged some other less straightforward approaches:

'We could, for instance, start an NGO, recruiting young gay volunteers to regularly visit and care for senior citizens at the latter's own places. However, I can imagine it would be difficult to manage the human resources if all the jobs are unpaid.

Alternatively, some old gay friends of mine have already tried to establish a reciprocal relationship with some young gay men (*huhui yanglao*). In this model, the elderly owns or rents an apartment. Then he sublets a room to a young man. The rent can be waived, on condition that the youngster could spend some time to keep the elder person company, and help to call the hospital in case of emergency.'

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85 A follow-up interview on 08 October 2016.

The rationale of the ‘reciprocal elderly care’ is similar to that of the legacy-support agreement as discussed in Section 5.1.6. Unlike a detailed legacy-support contract, the arrangement Ah-Shan mentioned is less formal, and does not involve serious consideration of death and wills, which may look less awkward in everyday life. Such reciprocity, however, rests on mutual trust rather than legal restriction, and might be fragile in the event of conflicts.

Ah-Shan also points out that for elder people who are relatively healthy and able to take care of themselves, what they need most is not a nursing home or a caretaker, but simply a place to gather, a sense of belonging. He explained,

‘We don’t need a high-profile elderly LGBT center like the one in Los Angeles, which is unrealistic, but we can definitely rent an apartment and make it a mahjong room, or a place to play chess or card games (*qipai shi*), so that our fellow *tongzhi* can meet up once in a while, without having to come out to their children. We could also make full use of this place when we don’t need it, for instance, by renting it to younger *tongzhi* groups for their meetups or workshops.’

The downplaying of sexual orientation in the above scenario is best understood not as a shameful denial of one’s own homosexuality, but a practical tactic of living well by keeping a low profile. Without making the gathering point flamboyantly ‘gay’, this idea may better serve married same-sex-oriented elderly people who are either closeted or who do not self-identify as LGBT or queer. The significance of being able to gather like this should not be underestimated, since the coming together of a group of people with similar experiences and expectations, no matter how obscure it may look, can help build a solid foundation for other legal-political claims.<sup>86</sup> Such daily-life tactics, together with more outspoken gay-visibility activism, are both crucial for the wellbeing of the marginalized.

All of Ah-Shan’s proposals go beyond the filial practices of obeying and providing. They highlight, to various degrees, the importance of finding ‘comrades’ who can share with and care for each other, either in a small household or in a larger community. Such longing for collective care is also seen among PFLAG parents as outlined above. More importantly, as the state cuts social welfare, and as younger generations are not always economically or physically able to take care of their parents and grandparents, exploring new modes of eldercare is not only a gay issue, but a pressing need for straight people of all ages as well, in China and elsewhere. In this sense, same-sex-oriented people’s imagination and practices are helping to address the anxieties faced by the wider population.

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86 Kees Waaldijk, ‘The Right to Relate: A Lecture on the Importance of “Orientation” in Comparative Sexual Orientation Law’ (2013) 24 *Duke Journal of Comparative and International Law* 1, 161-199.

### 5.3 SAME-SEX COHABITING ELDERLY PEOPLE

Due to their invisibility, I do not have a large sample of same-sex-oriented elders. Such invisibility partly leads to the pessimism among some young people: if there are so few elderly LGBTs showing up in our communities, then they must be either hiding in different-sex marriages or living pathetically alone. The lack of role models for a livable elder life conversely pushes many hopeless young people to put on the straightjacket, hoping to have a social and economic safeguard. As a lesbian bar owner mourns, 'even some alleged stone butches who never took off their pants in front of their girlfriends ended up getting married, having children and disappearing from the scene in their 30s!'<sup>87</sup>

Therefore, it is both academically and politically important to present some stories of how elderly same-sex-oriented people actually live their life in China, and what social and legal conditions contribute to their difficulties and sometimes, counter-intuitively, easiness. To be clear, the following three highly contextual cases I will show are by no means representative or copyable. However, what I hope to illustrate with the details in these stories is that invisibility does not necessarily suggest oppression only, and more importantly, that despite the difficulties, some livable and even enjoyable spaces do exist outside of the marriage-parenthood-eldercare straightjacket in contemporary rural and urban China.

#### 5.3.1 A Life-Long Companionship Without a Name

My encounter with Lao Feng and Lao Yang<sup>88</sup> was so littered with coincidences that they often say it was all down to karma. I set out to meet the two old women as part of an 'Oral History of Elderly *Lala*' project that had been initiated by a lesbian group in Chengdu. A self-identified butch lesbian, Hua, got in touch with the organizer Yushi to say that she knew two elderly '*lalas*' in her village, and would love to introduce me to them and to volunteer as our interpreter.

After tens of hours on the train and bus, I finally got to the small town where Hua and I had agreed to meet. Hua was 35 years old, with short hair and sportswear. It was more of a typical defeminized manufacturing worker's look than that of a fashionable butch. While walking to the village, Hua told me that she had been behaved like a boy since she was little. After graduation from high school, she became a migrant worker in Shanghai. It was while living in the metropolis that she learned to use the Internet, and discovered the lesbian world. She quickly embraced the 'L words' and found her sense of belonging in online and offline lesbian communities. It suddenly occurred to her that there were two elderly women living together

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87 I appreciate Qi Yu who thought through this point with me.

88 Their parenting experiences are described in Section 4.3.3.

in her village, both unmarried. They were farmers, but they also had a small cabinet selling snacks, cigarettes and beers to the neighboring farmers. Although she had not spent much talking with them, Hua was pretty sure that they were lesbians, just like her.

When she went home during that New Year's holiday, she bought a box of cigarettes, and in name of 'borrowing a lighter', she started to chat with them, and gradually they got to know one another. Almost every year, Hua would come back and buy some meat for them or give them money as a living allowance, just as a daughter would do. It was not just that she felt sympathy for the two, who were getting old but still living in very hard conditions, but deep down this life-long couple always gave her a dose of courage and confidence every time she felt hopeless on her road less traveled. However, she never came out to them, nor did she ask explicitly about their relationships.

Years previously Hua had bought the two an old cellphone, so she was able to tell them a week beforehand that she and a friend of hers would be coming to visit. When we arrived, I saw Lao Feng leaning against the doorframe, a cigarette in her hand, smiling at us and warmly inviting me in. It was not very common to see Chinese women (except for the youngsters) smoking, let alone an older lady. Their bungalow consisted of one bedroom, one dining room and a kitchen. Their toilet was a simple pit next to the farm. The cabinet from which they used to sell things was now empty and dusty, while the giant poster of Mao Tse-Tung was still red and shiny. As a gesture of hospitality, they insisted Hua and I sleep on their only bed, while they temporarily squeezed onto a stone counter during the nights we stayed.

After the first dinner, I began to introduce myself properly. I tried to explain in the plainest possible language about the oral history project. I simply said that I would like to know 'the stories of elderly people living together like you two'. They nodded their heads, but I could not tell if they really understood what it was about. During previous oral-history interviews with elderly *lalas*, when interviewers explained to those urban elderly self-identified *lalas* that there were many sisters like them, they would often feel so relieved they would start to weep. However, when I showed Lao Feng and Lao Yang a video clip about a meetup of elderly *lalas* from all over China, they neither reacted nor commented. I wondered whether they actually grasped the meaning of the video or the concept of homosexuality/lesbianism at all.

I felt hesitant to impose any label on them, lest it makes them uncomfortable or overwhelmed with a display of knowledge of a world beyond their experience. Hence, I simply said that I was interested in knowing more about their past. I also told them that I might share their stories with people who are interested, but would never reveal their real names or where they lived. They said they were fine. As I explained, the atmosphere became a bit stiff. I abandoned the idea of getting them to sign a consent form for the project, because I did not find it more ethical to introduce them to an

unfamiliar academic/activist culture and then waive my ongoing responsibilities by getting their signature on a document whose implications they might not fully understand. After all, the fundamental research ethics of 'doing no harm to your respondents' extends far beyond one single moment of consent.

Sitting next to them, I could not help but wonder: Why did neither of them decide to marry? Did they experience pressure to marry from their families, friends and neighbors? Did they find the socialist regime (1949-1979) repressive? How did they see their relationship? I did not ask them abruptly. Lao Feng lit a cigarette, and the memories, like the smoke, started to fill the room.

When they were younger, the two ladies were far less anxious about their future than is my generation. This is both due to their personalities and the political-economic environment. Lao Feng was classified as a 'poor peasant (*pin nong*)' because she lost both of her parents in her teens, had no land, and was unmarried. Being a poor peasant was politically and even economically advantageous in socialist China: she was given opportunities to work for the Party division of the production team in her town. She was in charge of allocating grain coupons, teaching at primary schools, mediating in spousal disputes and so on. As Feng reminisced she brought the world of her youth delightfully back to life:

'I got paid here and there, bit by bit. I liked it very much. Those jobs allowed me to go to many villages. No one restricted me, and I did not have much responsibility or many things to worry about. My friends were everywhere, and I often visited them and crashed at their places if we stayed up too late playing cards.'

She met Lao Yang when she was doing the Party's propaganda work in the latter's village. She was 26 and Lao Yang, 24. Four years later, Lao Yang suggested Feng move to her place to help her with farming and raising silkworms. Yang did not say she would pay Feng, but only promised to provide her food and accommodation. 'I agreed, and since then forty-five years has passed; sometimes I still feel it's like a dream,' said Feng.

Unlike later generations, they did not have 'nagging parents' to push them to get married to a man, which is again historically specific. In socialist China, young women were supposedly liberated from feudal norms, encouraged to be 'iron girls' as competent as men, whether on the farm or in the factory, and given a degree of freedom to marry and divorce.<sup>89</sup> Feng recalled that unmarried women were often commended for making a contribution to production, rather than dismissed and despised as 'left-overs', a pejorative and stigmatizing term often used now.

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89 See e.g., Wang Zheng, "'State Feminism'?: Gender and Socialist State Formation in Maoist China' (2005) 31 *Feminist Studies* 519-551; Neil J Diamant, 'Re-Examining the Impact of the 1950 Marriage Law: State Improvisation, Local Initiative and Rural Family Change' (2000) 161 *The China Quarterly* 171-198.

After the Reform and Opening-up process that began in 1979, farmland usage rights were privatized, and Lao Yang got her share. Since then, the two of them have been farming the land in front of their current cottage. When Feng moved in with Yang, the latter's mother did not object because she simply saw Feng as a friend and a helper. Yang's younger brothers all respect Lao Feng and call her 'big sister'. She has often played the role of a rational mediator or sometimes even the decision-maker at Yang's family meetings.

The two women managed to fulfill their filial duty of caregiving. When Yang's mother was too old to live alone, she went to live with her sons for some time, but eventually she decided to live with her daughter. Feng said proudly:

'Why? This old lady was hardly able to get along with her daughters-in-law. She also disliked being disturbed by her naughty grandchildren. So, certainly, she enjoyed more staying here with us. Much freer! No in-laws, no kids. She knew the villagers dropping by, and they could kill time together.

People often say, "you're doing much better than a daughter-in-law!" That's true, ha-ha. I chatted with her patiently, and I also helped her with bathing. People spoke highly of me. If I were not here, she may not have stayed with Yang, who is rather short-tempered, for almost ten years. She died here peacefully when she was ninety-three.'

Importantly, in Feng's narrative, no one – whether Yang's mother, the villagers, Yang or herself – saw her as a kind of in-law. Perhaps in their perception, her relationship with Yang was simply neither a marriage nor anything resembling it. It is the namelessness of these three women's cohabitation that made it livable for them and acceptable for others. Meanwhile, the absence of any formal or informal in-law status does not preclude their sense of kinship. By saying that Feng is not per se a daughter-in-law, but rather 'doing much better than' one, the villagers effectively acknowledge her contribution as a care giver, which could be seen as an informal recognition of this unusual family.

As Feng and Yang entered their sixties in the 2000s, they became entitled to certain welfare provisions for rural elders. Feng is a recipient of 'five guarantees' (*wubao hu*),<sup>90</sup> since she is old, having no source of income, and no statutory obligors to provide for her.<sup>91</sup> In contrast, a different-sex elderly married couple in rural areas, no matter how difficult their circumstances, cannot enjoy the same level of welfare benefits. The absence of legal recognition of their cohabiting relationship means that, in the eyes of the law, Feng is a poor old 'single' woman. In other words, the unintelligibility, in legal

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90 See Regulations on the Work of Providing Five Guarantees (2006) adopted 11 January 2006, effective 1 March 2006. Article 2: 'The term "providing five guarantees in rural areas" in these Regulations means providing villagers with care and material support in their daily lives in terms of food, clothing, housing, medical care and burial expenses in accordance with the provisions of these Regulations.'

91 *Ibid*, Article 6.

terms, of their same-sex cohabitation actually played an unintended role in qualifying Feng for the 'five guarantees', which, in their village, amounts to a pension of around 1000 RMB per year. It is a very small amount for urbanites, less even than the minimum monthly wage, but for her, 'the allowance is more than enough for me to smoke a bit. I'm quite happy with that.'

Lao Yang, on the other hand, cannot enjoy five guarantees because she has an adoptive daughter and is considered to have stable income from the farm, the land usage rights to which are registered under her name. She is covered by the basic social endowment insurance for rural dwellers.<sup>92</sup> She told me that the age on her identity card is ten years older than she actually is. She went to correct it, but the government official suggested that she not rectify this mistake, so that she could receive slightly more insurance by virtue of being someone who is 'over eighty years old'. What the official did was subtle but significant. Perhaps out of sympathy, he or she covered up for Lao Yang. This suggests that the legal consciousness of the enforcers of law can be as nuanced as that of lay people. In this scenario, this official both obeyed the law (with regard to the amount of the insurance paid to the elderly of different ages) and resisted it (by not correcting Yang's age).

Lao Yang also told me that she could obtain an extra allowance of 200 RMB before the end of each year, but she could not remember under what provision the money is given. Moreover, a few years ago, a salesman persuaded Lao Yang to buy commercial health insurance. She spent a large proportion of her savings on the premium, and she has received an insurance payment of 750 RMB every month since 2012. Despite receiving their various benefits, Feng and Yang's lives are far from affluent. Although Lao Feng said she felt satisfied with the money they have, she also explained the difficulties they face;

'We have to be thrifty; otherwise we cannot afford the seeds, fertilizer and pesticide for the next year. As we become older, we have to hire some young men to help us on busy days, and that cost 200 RMB per day. Sometimes Lao Yang begrudges paying the money and insists working by herself, but constant overwork has compromised her health, and the medication becomes another major expense.'

Although their life may seem terribly Spartan to the urbane and relatively privileged queer clientele of lesbian and gay night clubs in the big cities, Feng and Yang did not complain too much about their economic situation, which reminded me that my spontaneous feelings of sympathy was already colored by class. Their satisfaction with their status quo came mainly from their enjoying a peaceful life of cohabitation. As Lao Feng said,

'We never had serious quarrels money-wise. I used to sell cigarettes and beers to neighboring villagers, and I gave all the money I got to Lao Yang. I never thought of keeping some for myself. She treats me well in return; she buys clothes for me, and she always gives me more meat while she just eats more rice.'

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92 Articles 20 and 21 of the Social Insurance Law.

Life in this village should not however be romanticized. When I offered to take a picture of them together so that they could hang it in their living room by way of decoration, they firmly rejected the idea. They simply said the neighbors would mock them, without explaining why, which might be a subtle indication that they had always understood the 'abnormality' of two women cohabitating and so all concerned try to navigate it by not overtly acknowledging it, let alone flaunting it. Although the villagers never made judgments in front of them, Lao Feng told me, on another occasion, that she knew some people might point fingers, but she simply didn't want to react. The resemblance to a wedding photo of a picture of the two of them together hanging in their living room might be seen as a provocation, and at least a break of a tacit mutual pact of 'don't ask don't tell' with their neighbors.

While turning down my offer, they both asked me to take nice individual photos of them, to serve in the future as portraits for their funerals. Feeling sad about their inevitable demise, I did not immediately respond to their request. They, on the contrary, took death as something they had long been ready for. They laughed and pointed at the roof, showing me two big sacks hanging from it. They told me that these were the cerements and other funeral items they had already prepared for themselves.

The material and mental preparation for death nevertheless does not address or diminish their concerns about their years before they die. The night before I left, Lao Feng smoked heavily, and gave voice to her worries:

*'As we are getting older, more problems arise. To be honest, I do have some worries. I don't have any relatives or offspring, while her health is worse than mine. If she got seriously ill, I would have so many difficulties... Had I died first, she would have her adoptive daughter and her farmland; but if she went before me, I would be doomed. No one is left in my family, and my small cottage in my hometown collapsed decades ago. No one will take care of my aftermath when I die. What should I do? ...'*

I remembered Lao Yang told me that she secretly saved ten thousand RMB for Feng and hid it somewhere. Since she did not want Lao Feng to know, I did not mention it. Lao Feng went on, 'I have often considered hanging myself, but on second thoughts, this does her no good. So, I still hope she is healthier than me, and then I'm happy. This is my only hope.'

Late in 2016, while I was writing this thesis, Lao Yang became seriously ill. Although her medical expenses are partly covered by her social and commercial insurance, they still found it too expensive to stay in the hospital. Moreover, when Lao Yang was hospitalized in town, they were both uncomfortable. Although her adoptive daughter visited Lao Yang every day, she felt lonely and depressed, and became much more irritable. Lao Feng, on the other hand, was too old to travel from the village to the town to take care of her. She also found it hard living on her own – collecting firewood and cooking, all by herself, was hard work. She couldn't sleep and sighed all the time, frequently expressing suicidal thoughts during our calls.

A week later, Lao Yang ask to be treated at home. Although her condition had better be monitored in hospital, both of them felt much better after they reunited.

What made it difficult for Lao Feng to stay in hospital during this episode was not the law's failure to recognize same-sex partnership, but intersectional difficulties arising from her age, health and lack of wealth, which can equally affect any lower-class, straight, elderly spouse as well. Likewise, when Feng thought about suicide, it was not predominantly the lack of gay rights or the 'reticent homophobia'<sup>93</sup> in their village that made her feel so desperate, though it is possible that those mattered to some extent. Her major problem is rather the fear that she might face death alone, without sufficient financial resources, either from state welfare or from her savings, and without a companion who can both help with the housework and give her emotional support. This prospect, of an uncertain and precarious life, is also what younger same-sex-oriented people fear most.

As we got closer, Feng and Yang often expressed directly their love for me, although they never used the word 'love' to describe their feelings towards each other. I was wondering: how do the two define their relationship? Partnership? Sisterhood? Companionship? To my surprise, they used a political term in Mao's time. 'We have a self-reliant relationship', said Lao Yang, which is not even grammatically correct.<sup>94</sup> 'Self-Reliance and Hard Work'<sup>95</sup> was a crucial slogan used by the Chinese Communist Party from the 1950s to the early 1970s, when Western countries refused to recognize the legitimacy of its rule and blocked economic and political relations with China. This was not just a party-political slogan, but became a moral imperative for the wider population. Those who relied on themselves instead of complaining about Chinese society, be it farmer or worker, were the objects of praise. This public virtue, with its political origins, in effect justified Yang and Feng's decision to cohabit and remain unmarried, just like Feng's having 'poor peasant' status made her a proud farmer and also lent them some economic benefits. Here we can see comrades' love was not just parodied in today's gay/*tongzhi* communities, but was embodied far more literally throughout the two's self-reliant and hardworking lives together.

Hua wasn't satisfied with the unromantic term 'self-reliance'. She was still eager to extract the answer she was hoping for. When Lao Feng was cooking in the kitchen, she asked Lao Yang what kind of sentiments (*ganqing*) she thought they had.

'What kind of sentiments?' Lao Yang seemed not to understand the question. Hua changed a word, connection or relationship (*guanxi*), and Yang said, 'Nothing, like... just funny (*haowan*).'

93 Ding and Liu, 'Reticent Poetics, Queer Politics' (2007).

94 In Chinese they said '我们是自力更生的关系'.

95 The slogan in Chinese is '自力更生、艰苦创业'.

Hua asked further, naughtily and tentatively, 'Just funny? Don't you think this is love?' Yang acted like a mother pretending to get angry to her child, beat Hua slightly and muttered, 'Love? Hell no love.'  
 Hua insisted, 'Haven't you given her any commitment or something?'  
 'No commitment whatsoever.'  
 'Have you sworn as sisters then?' Hua might be thinking of the 'self-combing women', a form of female love and sociality in late Qing Dynasty.<sup>96</sup>  
 'No, we never mentioned that.'  
 'Doesn't Aunt Feng want you to give her a proper title?' Hua seduced her to say words like girlfriend, wife or at least something more intimate.  
 Lao Yang disappointed her again, 'A title? What about "food and drinks covered"?'

Another day, we asked the same question to Aunt Feng in the kitchen. She said naturally, 'living companion'.<sup>97</sup> Hua asked if she felt they were like husband and wife, she burst into laughter, as if this was a ridiculous joke. Later I explained to both of them, 'In the country where I live now, two women can really get married!' Again, both of them laughed and refused to believe the clearly deluded words coming from my mouth. Lao Feng said, 'How can such a weird thing happen!' Lao Yang agreed, 'How's that possible? You must be kidding us!'

Hua tried to poke into how they slept, and Feng said easily, 'On the same bed.' Hua asked her if they touched each other, and she said no. When the same question was put to Lao Yang while she was working on the farm, she was quite clear; 'We sleep separately.' Feeling that she risked offending them, Hua stopped raising questions about sexuality, and suspected this might be taboo. She expressed her frustration when two of us went for a walk around the farm:

'I feel I should say sorry to you. I shouldn't have brought you to such a remote village when it turns out they are not *lalas* like I thought! Am I wasting your time? I apologize if you didn't get any useful data.'

I told Hua that she was worrying unnecessarily. When older people use terms like 'self-reliance' rather than dipping into the lexicon beloved of academics and activists, it mattered not whether it be love, cohabitation, partnership, friendship, sisterhood, kinship, or chosen family. I simply could not be more overwhelmed by their everyday wisdom, as well as how the oft-assumed anti-sex political situation of Mao's time enabled them to survive. Even today, I still do not know the 'truth' about their sexual preferences or how they sleep, and I have no interest in probing further into it.

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96 For Chinese 'self-combing women' (*zishu nv*) who avowed spinsterhood in Qing Dynasty, see Saskia E Wieringa, *The Admonishment of Vegetarian Great Aunt: Reflections on Sexual and Gender Multiplicity and Culture* (Inaugural Lecture at Amsterdam Institute for Social Science Research (AISSR) 2007); Tze-Lan D Sang, *The Emerging Lesbian: Female Same-Sex Desire in Modern China* (University of Chicago Press, Chicago and London, 2003) 17.

97 In Chinese she said '生活上的伴'.

Leaving the question perpetually a myth is my way, and their own, to counter the voyeuristic gaze.

Interestingly, looking back this experience, I set out to find and interview 'rural elderly *lalas*', but now I feel reluctant to call them *lalas* or lesbians at all, as such terms are far too arbitrary an epistemic imposition. Lao Feng and Lao Yang are both lesbians and non-lesbians in different senses. When I shared their story with friends from different walks of life, their reactions cast further light on the complexity. One experienced, middle-aged lesbian activist said quite confidently;

'Surely they are *lalas*; they must be too shy to tell you about the sex part! They are not married, one of them looks butch and the other femme, and they don't want to take photos together ... See, so many hints!'

In contrast, a transgender activist suggested I should not call them *lalas* if they did not self-identify as such. I agreed. But she continued,

'If I were you, I would leave this story out from my thesis altogether. Without knowing if they had had sex, you lost the most crucial part of their sexual orientation. It is indeed a fascinating story, but it's an irrelevant one, if you're writing about *tongxinglian*.'

Is sex really the 'most crucial part'? Is lesbianism somehow only validated and sanctified by a physical and publicly attested sexual act? Should I probe further before I write anything about their old age? I notice a confessional imperative of which Foucault has reminded us. It is such essentialization and centralization of sexual activities that first constructed the homosexual as a discrete entity for the purposes of social control.<sup>98</sup> Conversely, the two women's' non-identity, invisibility and ambiguous expressions are precisely what kept them from stigmatization and regulation. The perpetually unknown a/sexual relationship between them also exposes, defies and mocks the society's obsessive curiosity about 'abnormal' sexualities.<sup>99</sup> Moreover, as shown above, whether they are lesbians or not, the multifaceted experiences in their life – as rural, lower-class, female-bodied, unmarried, elderly persons in poor health who have gone through pre-socialist till post-socialist historical phases – remain, and should not be sidelined by their sleeping arrangements.

I have visited Feng and Yang several times during and after my fieldwork. Since my return to the Netherlands, the three of us still keep in touch by phone almost every Sunday. Lao Yang said I call them more often than her adoptive daughter does. Sometimes they call me 'buddy (*huoji*)', sometimes they say I'm just like a daughter, and at other times they treat me like

98 See Michel Foucault, *The History of Sexuality (Volume 1: An Introduction)* (Pantheon Books, New York, 1978) 43.

99 For a discussion of how homophobia is not only about erasing homosexuality, but also knowing more, see Eve Kosofsky Sedgwick, *Epistemology of the Closet* (University of California Press, Berkeley and Los Angeles, 1990) 70.

a granddaughter. As our unnamable friendship-kinship deepens, unexpectedly, they two even started to poke into my relationship status, just like my own grandparents do. I used to tell them vaguely that I envied their lifestyle and might want to live with a woman, too. To my surprise, they objected seriously, and tried to dissuade me from going down the 'wrong' path. Without suggesting that they regretted their own choices, they stressed the difficulties of living an unconventional life. Later, when I mentioned that I had a male partner, they were sincerely happy, and encouraged me to get married soon. And after I separated from him, they scolded me gently for being too picky and for not wanting to settle down.

Their strong desire that I follow a 'straight' life path should not be simply understood as internalized homophobia. Antonia Chao has argued, in her trilogy about elderly butches in Taiwan, that many unmarried butch lesbians ultimately face a host of inconveniences, not mainly because of their deviant sexuality or unusual gender temperament, but of their non-normative lifestyle, and their 'incorrect' citizenship outside heteroreproductive families.<sup>100</sup> Chao's observation echoes the two women's worries about my unstable future, which is not always centered around my partner's sex. Here, homophobia is a less defining concern than the diaspora status one is given outside of an economically and morally safe haven.

For all these years, the two ladies and I have never overtly discussed homosexuality or same-sex love. Even today, I still have not told them in detail about my research project. I have been constantly surfing the ambiguities between us, without assuming that their vague words here and there must be hinting on some 'deeper' truth about their sexualities.<sup>101</sup> This is an instance where informed consent as required by academic ethics does not sit easily with the subjectivities and relationships whose existence rely on a certain level of silence and ambiguity.

### 5.3.2 Male-Male Friendship/Kinship

I did not encounter cohabiting elderly male couples in rural areas in my fieldwork, but only a few elderly *tongzhi*-identifying men in some cities. I met Lao Wang through an HIV/AIDS-education volunteers' group. He was a man in his sixties. Having felt confused about his sexuality, he did not dare to explore any sort of same-sex relationship until he was 47. Before that, he had only secretly experienced casual sex in cruising parks and public

100 Antonia Chao, 'Death Rituals, Kinship Ethics and Queer Friendship: Elderly Lesbian Tomboys in Taiwan' (2008) 6 *Router: A Journal of Cultural Studies* 153-194; 'Moving House: The Relational-Materialistic Aspect of Queer Cultural Citizenship' (2002) 57 *Taiwan: A Radical Quarterly in Social Studies* 41-85; ' (In)Calculable Intimacies: Moving House Thrice Visited' (2010) 80 *Taiwan: A Radical Quarterly in Social Studies* 3-56.

101 For a critique of the obsession with 'depth', see Rey Chow, 'The Force of Surfaces: Defiance in Zhang Yimou's Films' in Rey Chow (ed) *Primitive Passions: Visuality, Sexuality, Ethnography and Contemporary Chinese Cinema* (Columbia University Press, New York, 1995) 142-172.

toilets outside marriage. Once his son had grown up, he got divorced and started to look for a committed same-sex life partner, but he soon found it was difficult to keep monogamous in a 'world of friends'. In his early sixties he met his current 'friend', a young man who is *lianlao* (literally, elder-desiring), or to use the slang, an 'archaeologist'. *Lianlao* groups belong to an even more invisible subculture compared to 'respectable' gay couples of similar ages. Wang talked about the open and caring 'friendship' between them:

'We promised not to get involved in one another's sex lives. We agreed to be mutually understanding, tolerant and open. We've been together for more than three years, and whenever we found someone attractive, we'd go dating, as long as we're honest about where we are. Our 'red line' is having safe sex. We agreed that in case either of us gets infected with any STD, we should tell the other. A month ago, I met a young man online, and our relationship developed like burning fire. As promised, he does respect the other friends of mine.

I believe we can form a family of "one father and two sons". We'll see. Of course, there are many destabilizing factors; their marital pressure or our small fights, but I said, "I will try my best to treat you both well, and you should see each other as brothers". They both like old men, so they won't fall in love with each other. They may get jealous, but they haven't had any disagreements as far as I know. I still live with my first "son", and the other one often comes over to have dinner with us. I hope they take care of each other like family, especially after I die.'

Looking back, Wang told me proudly that his biggest success in life was holding onto his sexual desire, while still maintaining his responsibilities to his conventional nuclear family, at least before he divorced. Unlike the married gay men depicted in the mainstream media, he did not express any sense of guilt, nor did he find his same-sex desire and different-sex marriage incompatible. In Wang's mind, different-sex marriage still provides a guarantee of social status and care in old age, as Lao Yang and Lao Feng tried to convince me:

'Now that my cohabiting "son" is twenty-eight, I often try to persuade him to get married. He said, "No, I want to live with you forever". I understand his wish and stop pushing him, but deep down I still hope that he marries a nice girl. I don't want him to get old alone.'

The fact that he has multiple lovers does not diminish Wang's longing for legal recognition of same-sex marriage, something he believes would reduce homophobia in society. One year later, in a follow-up interview, I asked whether he thought his current relationship status would be incompatible with same-sex marriage should that be possible the future, but which would probably be limited to two people only. He replied in writing,

'Well, to me, a monogamous same-sex marriage is simply a romantic fantasy. The Internet makes it almost impossible for *tongzhi* to maintain one-on-one relationships – at least I find it difficult to say no to someone I really like. If marriage were open to same-sex couples, I think I could only follow the mainstream and practice monogamy. Even though this is at odds with my ideal of having a *lianlao tongzhi* family with two or more "sons", I still have to obey the law.

Currently I have four “sons” in stable relationships with me, and I’m cohabiting with one of them. As usual, I ask them to treat each other like brothers, and they do. I just cannot resist their eyes that sincerely long for paternal and passionate love. They care about me, which I find really moving...’

He kept repeating how well he and all his lovers get along, without acknowledging that the way he actually lives his life contradicts, or at least questions, his claim to be law-abiding in the imaged scenario of a monogamous same-sex marriage. Perhaps he did not see it as the contradiction I did. Perhaps his desire to comply with the expectations of ‘the mainstream’ and ‘the law’ can well coexist with his actual practice of having multiple ‘sons’, just as he managed both his former different-sex marriage and his same-sex desire.

Legally speaking, however, if there were same-sex marriage in China, he might face problems. Some of his ‘sons’, the youngsters he loves, are over the age of sexual consent (14 years old) yet below the age at which one can legally marry (22 years old for men). Or, he might find himself committing bigamy, or could be at fault in a divorce case as a result of his extra-marital affairs. Property arrangements involving different lovers should he divorce or die might also be complicated. Therefore, he might not escape the shadow of law, even if he does not bother thinking about it as a lawyer would. Similarly, when asked if he had ever had any legal problems, Lao Wang said he almost never thought of the unequal rights between different-sex and same-sex couples in adoption, social security, or inheritance before I brought them up to him – such issues seem not to be a day-to-day concern of his. His primary practical concern now is whether he can get by on his pension and savings, and other putative legal rights seem rather abstract in comparison.

Of course, the fact that Wang already has a biological child who is legally obliged to take care of him may function as an important safety net for his current carefree lifestyle. His story might be very different if he had no offspring. Moreover, in Wang’s account, his ex-wife’s perspective is missing. I could not speculate about her life conditions and feelings, but a feminist query is necessary: To what extent is the courage to divorce and embrace multiple (sexual) partners gendered? Could his ex-wife gratify her own desires through online dating as conveniently as can Wang? Another point to note; there is an absence of comparable narratives from Wang’s female equivalents. I could not find any ‘archaeologist lesbians’ – no such term exists – and I only met a few young lesbians who are willing to openly declare that they have multiple lovers. Are they just fewer in number or is the erotic space for women narrower? Such questions are beyond the scope of this book, but it should be a caveat for researchers to remain alert to gender differences in old age.

Lao Wang’s non-monogamous same-sex relationships provide a vivid example of Foucauldian ‘friendship as a way of life’, which can be, but is not necessarily, based on gay sex.<sup>102</sup> Similarly, the above-mentioned older

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102 Michel Foucault, ‘Friendship as a Way of Life’ in Paul Rabinow (ed) *The Essential Works of Foucault 1954-1984 Volume 1* (The New Press, New York, 1997) 135-140, 136.

couple Wen and Bin<sup>103</sup> also openly accept each other's casual or regular (sexual) partners. However, I am hesitant to romanticize it with the term 'polyamory', a buzzword that is increasingly used in Western societies and even in urban China, not just because of the specific cultural-material conditions of its origination and popularization.<sup>104</sup> In Wen and Bin's case, for instance, as Wen is hemiplegic and stayed in a nursing home in northern China, while Bin is working in a construction site in the south to provide for Wen's monthly care-taking fees, they are only able to see each other once or twice a year. They talked about their current relationship not in terms of consensual non-monogamy. Rather, Bin told me that they simply could not help but tacitly accept each other's sexual encounters, which is the only way to sustain their long-distance relationship while meeting their respective needs for sexual satisfaction and intimacy. The same applies to Lao Wang's case, where tomorrow might be hard both for him, an old man outside the life trajectory of a respectable elder, and for his young partners, who still face pressures to maintain conventional marriages and have children. For them, it might be more practical to 'live in the moment' with people they like than to plan for a monogamous and decent future.

### 5.3.3 Elderly Same-Sex-Oriented People in Marriage

Unfortunately, I cannot offer the stories of many same-sex-oriented respondents who have remained married. I did interview an elderly, self-identified *lala* who was both married and kept a secret, life-long same-sex lover. However, she later told me that she was no longer identified as a *lala*, and so asked me not to use her story in the oral-history project or in my thesis. I am thus prevented from explaining in detail why she changed her mind. What I can share is my observation that this label first came to her mind from a TV show. While it helped her find a lesbian community and feel less lonely, it also produced some turbulence in her family life. *Lala*, for her, is an identity and a subculture too costly to insist on.

Likewise, the rejection of clear identification with the notion of being 'born-this-way' and 'immutably gay' is evident in the lived experience of elderly same-sex-oriented men. According to one of my respondent, Lao Zhang, a man in his sixties, many of his peers had been married long before they were aware of the word 'gay' or 'homosexual', let alone this new and controversial phenomenon of 'marriage fraud' and *tongqi*. Back then, one's different-sex marriage and inexplicit homoerotic life seemed more compatible than it is today, although when before getting married he felt somehow ambivalent as well, Lao Zhang acknowledged. He told me that when he

103 See Section 5.1.3.

104 Elizabeth F Emens, 'Compulsory Monogamy and Polyamorous Existence' in Martha Albertson Fineman, Jack E Jackson and Adam P Romero (eds) *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (Ashgate, Burlington, 2009) 179-198.

was young, he had had '40 to 50 percent of feelings' towards his wife, and he indulged his 'hobby' of 'having a little fun' with men in the bath house.

Unlike younger, married gay men these days who tend to deny their sexual preference when their wives question their heterosexuality, or feel guilty, ashamed and apologetic when they get caught, Lao Zhang had quite a different attitude:

'Three years ago, my wife confronted me, "do you like men?" I admitted generously, "yes, but so? Am I disqualified to get married then? Experts say ten million men who like men are married to women. Have you seen millions of divorces? We have our children and grandchildren; we have enough pension for our late life; and I care about our family, which you always know. What else do you worry about?"

Lao Zhang's interpretation of the statistics of *tongqis* is the opposite of the media's, the latter painting it as a massive and terrible problem. The experts' claim that there are millions of mixed-orientation marriages instead gives him a sense of legitimacy. We should not simply see this as a clever excuse, namely that the law cannot be enforced when everyone is an offender. Rather, it helps us understand better the historicity of gay and *tongqi* identities and that of the construction of mixed-orientation marriages as a tragedy. 'I didn't think about it much, but followed suit and got married', Lao Zhang said, recalling his life at the collective work unit in socialist China that substantially restricted individuals' mobility and privacy.<sup>105</sup>

Zhang said his wife's attitude gradually changed following his admission:

'Later she thought things through. Now that I'm volunteering for an HIV/AIDS hotline every Wednesday night, she even cooks for me earlier and reminds me not to be late. She's really nice and industrious (*xianhui*), for which I'm grateful. Sometimes I bring my wife to the volunteers' meet-up as well, so do my old fellows. Our wives go hiking with us on some weekends, too. It's like a big family.'

I did not have a chance to speak with their 'big family' during my short stay in their city. I did not manage to interview his wife, either, who may have suppressed resentment, hurt or unhappiness in order to be a 'nice and industrious' woman. She may, just like average wives in China, have much fewer opportunities and less moral leeway for extra-marital sex than the men do. Also, her choice to stay married may well be because elderly women's living conditions are likely to be worse outside marriage.<sup>106</sup>

105 For a discussion of how the work unit in socialist China partly replaces family authority and serves as an institution of social control, see Naughton Barry, 'Danwei: The Economic Foundation of a Unique Institution' in Xiaobo Lu and Elizabeth Perry (eds) *Danwei: The Changing Chinese Workplace in Historical and Comparative Perspective* (M.E. Sharpe, Armonk, 1998) 169-171; Pan Suiming, 'Transformations in the Primary Life Cycle: The Origins and Nature of China's Sexual Revolution' in Elaine Jeffreys (ed) *Sex and Sexuality in China* (Routledge, London and New York, 2006) 21-42.

106 See Chapters 3 and 4. See also, Zhu, 'Unqueer Kinship?' (2017).

However, I still presented the partial story of Lao Zhang, hoping it to be a starting point for us to see mixed-orientation marriages through other lenses than ‘marriage fraud’.

### 5.3.4 Summary

When put together, the disparate stories in this section has partly explained why elderly LGBT people are so invisible in China. It is not necessarily because what is oft-assumed to be a ‘conservative’ society pushes them into marriage and deters them from coming out. Rather, it might be because they do not identify as such, or do not consider their sexuality to be the single most important dark truth in their life with which they have to struggle. Their detachment from contemporary LGBT identity politics, whether intentional or not, might be evidence of homophobic silencing, but it can also make their respective lives more tolerable, sustainable and sometimes even enjoyable. In particular, the ‘self-reliance’ of the two ladies, the ‘one-father-multiple-sons’ relationships of Lao Wang, as well as the ‘big family’ of Lao Zhang, are all creative names they give to their non-normative practices, which fall outside the current discourse on LGBT rights. Although such stories do not entirely overlap with the experiences of a younger generation, they give an insight into the complex circumstances of people’s intimate and social lives. They can hopefully broaden the way we think about eldercare beyond the ‘straight’ lifestyle, and help us worry less about ‘no country for old men’<sup>107</sup>.

## 5.4 CONCLUSION

This chapter shows the push-and-pull forces between the straightjacket of a marriage-parenthood-eldercare life trajectory (*jiehun-shengzi-yanglao*) and the various ways of living otherwise. Many of the laws that govern old age do not directly discriminate against non-heterosexuals, but rather draw an arbitrary line between marriage and non-marriage. As shown in Section 5.1, Family Law 1, 2 and 3 grant most privileges to married couples and the kinship arising therefrom, in terms of pension, insurance, medical care, inheritance and so on. That explains why the straightjacket of an ‘ordinary’ elder life is warm and protective, despite its tightness. FL4 norms are also salient here, such as the cultural imperative to ‘go home often’, the proverb ‘bring up sons for help in old age, and store up grains against famine’, and the bundling of care and submission in the conventional understanding of ‘filial piety’.

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107 This term comes from the title of a 2005 novel by a U.S. author Cormac McCarthy, which was adapted into the 2007 film of the same name. In Chinese, the film was translated into ‘*Lao Wu Suo Yi*’, meaning having no one to depend on when one gets old.

Meanwhile, fissures do exist. The same written laws in many aspects turn out to be lenient and flexible. For instance, the elderly can make a legal argument that their freedom to marry should not be interfered by their children, although its validity may be contested as there is no lawful same-sex marriage;<sup>108</sup> there are some roundabout ways to become the beneficiary of the personal life and health commercial insurance of one's same-sex partner;<sup>109</sup> in practice, accessing the same-sex partner's medical record in hospital may be permitted;<sup>110</sup> the right to make surrogate medical decision in an emergency may also be granted to a non-family 'related person';<sup>111</sup> if a donor has a 'developed family relationship' with the patient, living organ donation may be allowed between non-family members;<sup>112</sup> a legacy-support agreement can override statutory or testamentary succession;<sup>113</sup> and continued tenancy is guaranteed to any cohabitant of a deceased person regardless of kinship status.<sup>114</sup>

The flexibility in these laws implies that unlike the enormous pressure upon young people to get married and to have children, the marital-familial norms seem to bind less tightly on how people actually live their later years. This is probably because, unlike the more clear-cut boundaries between married and unmarried people, and those with and without children, the line between the old and the young is always vague. Everyone is inevitably ageing and may become hospitalized even before getting old. In Fineman's words, vulnerability and dependency are universal.<sup>115</sup> Therefore, there seem to be fewer moral judgments passed on the vulnerable and the dependent, especially due to the inevitability of ageing, than on the unmarried and the childless, as the latter are often seen as choices rather than biology. However, when the statuses of the unmarried, childless, same-sex-oriented and elderly intersect, the law does not always prioritize the protection of the elderly over the social control of the 'abnormal'.

Despite the ageing anxiety, few of my respondents have made legal plans for their old age to alleviate the pressure, probably because the legal certainty of the contracts could not dispel their pessimism about the illegitimacy and precariousness of their same-sex relationships. Also, making legal arrangements in a non-familial often requires extra money and effort, so the 'why-bother' legal consciousness of many same-sex-oriented people also exposes the way the law and regulations inconvenience and degrade them.

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108 See Section 5.1.1.

109 See Section 5.1.2.

110 See Section 5.1.3.

111 See Section 5.1.4.

112 See Section 5.1.5.

113 See Section 5.1.6.

114 See Section 5.1.7.

115 Fineman Martha Albertson, "Elderly" As Vulnerable: Rethinking the Nature of Individual and Societal Responsibility' (2012) 20 *Elder Law Journal* 101-142, 116.

Eldercare is an interactive activity involving both giving and taking. In addition to the fear of their own ageing, the young mid-aged same-sex-oriented people have to negotiate their filial obligations towards their ageing parents. They tend to break down filial piety into obedience, economic support, physical care and emotional sustenance, and then decide where to put their emphasis.<sup>116</sup> Some open-minded parents of same-sex-oriented children, especially PFLAG members, have to some extent absolved their children of the requirement to be obedient.<sup>117</sup> Both groups have lowered their expectations of offspring-supported care in old age, while collective or intergenerational caretaking is increasingly salient, and will possibly grow fast.<sup>118</sup>

On the other hand, the ethnography of the older people in this chapter have shown that even though ageing is inevitable and often unpleasant, the ways one can negotiate it always go beyond convention. Interestingly, contrary to same-sex-oriented youngsters' anxiety about ageing, those who are already in their later years seem to be more carefree – let us recall Lao Yang and Lao Feng's laughter when they talked about their funeral portraits;<sup>119</sup> Lao Wang's joy when talking about his 'friends/sons';<sup>120</sup> and Lao Zhang's contentment in having both a considerate wife and a group to belong to.<sup>121</sup> Their sense of ease might in part be due to their personalities, but we should not forget that their specific political and cultural environments sometimes provide them with several unintended conveniences: borrowing the socialist discourse of 'self-reliance', female same-sex cohabitation in the countryside was not seriously problematized; the intergenerational father-and-son-like relationships between several men is likely to fall out of the moral surveillance by the heteronormative surroundings; and unromantic, pragmatic attitudes towards different-sex marriage among older same-sex-oriented people have also largely prevented their identity crisis.

Of course, the global nature of the gay rights discourse and the encouragement towards realizing one's 'true sexual self' are hardly reversible, making it more difficult for LGBT-identified people of younger generations to trivialize their sexuality or get married without a sense of guilt as an earlier generation did. Such intergenerational differences deserve more attention in both academia and amongst activists. One implication that runs through all three sections in this chapter is a potential legal-advocacy approach that goes beyond gay rights, and instead focuses on interdepen-

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116 See Section 5.2.1.

117 See Section 5.2.2.

118 See Section 5.2.3.

119 See Section 5.3.1.

120 See Section 5.3.2.

121 See Section 5.3.3.

dency and vulnerability.<sup>122</sup> For instance, there can be a term-by-term examination of whether marriage or kinship is an arbitrary dividing line when deciding survivors' pension, access to medical record, surrogate medical decision rights in emergency or the beneficiaries of life insurance. The unlinking of heteronormative marriage and those legal rights will serve the cause of justice for unmarried and/or childless straight people as well. This beyond-marriage approach will be further concluded in the last chapter.<sup>123</sup>

In this chapter, none of my respondents fought against the law face to face; their stories are more akin to what Harding describes as the kind of 'resistance that seeks to challenge the everyday assumptions about family, relationships and sexuality'.<sup>124</sup> In the next chapter, the obedience to, use of and the various forms of resistance against Family Law will be discussed further, from a separate but related perspective: legal activism.

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122 The beyond-marriage line of thinking can be found in Fineman, "'Elderly" As Vulnerable' (2012); Polikoff, *Beyond (Straight and Gay) Marriage* (2008); Michael Warner, 'Beyond Gay Marriage' in Wendy Brown and Janet E Halley (eds) *Left Legalism/ Left Critique* (Duke University Press, Durham and London, 2002) 259-289.

123 See Section 7.5.

124 Rosie Harding, *Regulating Sexuality: Legal Consciousness in Lesbian and Gay Lives* (Routledge, Oxon and New York, 2011) 180.

The previous three chapters have focused on the everyday legal encounters of same-sex-oriented people in terms of marriage, parenthood and elder-care. This chapter has a different yet closely related perspective, namely, the interaction between Chinese LGBT<sup>1</sup> activists<sup>2</sup> and the law, as well as their linkage with global activism. This chapter pivots around the following questions: What is buttressing the emergence of LGBT legal activism in China in the 2010s? What efforts have been made by LGBT activists to utilize Chinese and international laws and simultaneously to change them? And what theoretical and political implications can we draw from these attempts?

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

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

## 6.1 EMERGING CHINESE LGBT ACTIVISM

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

Indeed, in the past two decades, LGBT activists have carried out various forms of advocacy without directly engaging the law: setting up *tongzhi* hotlines;<sup>7</sup> conducting HIV / AIDS prevention outreach in cruising parks or bath houses;<sup>8</sup> coming out on TV;<sup>9</sup> coming out to family and friends, especially with the help of Mama Wu<sup>10</sup> and other PFLAG parents;<sup>11</sup> providing match-making fairs for lesbians and gay men seeking for a cooperative

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

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

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

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- 12 For instance, the QQ group 'Magic Karma (*qiyuan yisheng*)' established by two lesbians in northeast China is an online space to seek cooperative marriages. They also organize offline events. Likewise, the 'Moon Loving Flower (*yue lian hua*)', a lesbian bar in south-west China, also organizes regular match-making events.
  - 13 *Lala* camp is an annual training camp held in China for Chinese-speaking lesbian activists from China, Hong Kong, Macau, Taiwan and the overseas since 2007. It has become an important ground for breeding young lesbian activists and empowering grassroots lesbian communities in China. See Yip Lo Lucetta Kam, *Shanghai Lalas: Female Tongzhi Communities and Politics in Urban China* (Hong Kong University Press 2013) 3.
  - 14 Current lesbian dating applications include Lesdo, LesPark and The L, and their gay counterparts include Blued and Zank.
  - 15 *Tongyu* and Beijing LGBT center have cooperated with the social-work, psychology or sociology departments in several universities; similarly, the Gay and Lesbian Campus Association of China has liaised with tens of LGBT-friendly university professors in Guangzhou to develop various curricula on sexual and gender diversity. The popular open course Society, Culture and Diverse Gender/Sexuality at Sun Yat-Sen University has attracted hundreds of students and citizens in Guangzhou.
  - 16 One of the most well-known act was the photoshoot of two women in wedding dress at Qianmen Gate in front of the Tiananmen Square in 2009, see documentary 'New Qianmen Gate' made by Popo Fan; a recent performance art is the marriage proposal made by a college girl to another in Guangzhou in their before their graduation, see Owen Churchill, 'University Labels Lesbian Students' Proposal Obscene', 2016 June 30, at [www.webcitation.org/6odPYkAc3](http://www.webcitation.org/6odPYkAc3).
  - 17 China Rainbow Awards, at [www.webcitation.org/6odPQAJZS](http://www.webcitation.org/6odPQAJZS).
  - 18 See Call for Application for Queer University, at [www.webcitation.org/6lWTRSNmj](http://www.webcitation.org/6lWTRSNmj).
  - 19 For a discussion of such hybridity, see Raewyn Connell, 'Meeting at the Edge of Fear: Theory on a World Scale' (2015) 16 *Feminist Theory* 1, 49-66; Fran Martin and others, 'Introduction' in Fran Martin and others (eds) *AsiaPacificQueer: Rethinking Genders and Sexualities* (University of Illinois Press, Urbana and Chicago, 2008) 1-28.
  - 20 Harding theorizes three different kinds of resistance: stabilizing, moderate and fracturing resistance. See Harding Rosie, *Regulating Sexuality: Legal Consciousness in Lesbian and Gay Lives* (Routledge, Oxon and New York, 2011). Wieringa also discusses a sliding scale of subversion, in Saskia E Wieringa, *Heteronormativity, Passionate Aesthetics and Symbolic Subversion in Asia* (Sussex Academic Press, Brighton. Chicago, Toronto, 2014).

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

## 6.2 THE STIMULI FOR CHINESE LGBT LEGAL ACTIVISM

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

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

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

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

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

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

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

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

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

26 For instance, a real estate company *Wanguo* has set up its 'rainbow affairs department' in 2014, at [www.webcitation.org/6qYwjiaoV](http://www.webcitation.org/6qYwjiaoV).

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

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

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

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- 28 Timothy Hildebrandt, 'Development and Division: The Effect of Transnational Linkages and Local Politics on LGBT Activism in China' (2012) 21 *Journal of Contemporary China* 77, 37-41.
- 29 Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (2007), at [www.webcitation.org/6s4SjtYYt](http://www.webcitation.org/6s4SjtYYt). See also, the blog article of the Chinese expert Yanhai Wan, 'Activists in Beijing Celebrate the Issuing of Yogyakarta Principles', 27 March 2007, at [www.webcitation.org/6r3wmzn1R](http://www.webcitation.org/6r3wmzn1R).
- 30 See 'Equal and Indivisible: Crafting Inclusive Shadow Reports for CEDAW', ILGHRC (2009), at [www.webcitation.org/6qYxCmKmG](http://www.webcitation.org/6qYxCmKmG). For the details of advocating during CEDAW review, see below, footnote 154 and accompanying text.
- 31 See Tongyu, *World Map of Tongzhi Rights* (全球同志权益地图), 2013, at [www.webcitation.org/6qYxGeRV7](http://www.webcitation.org/6qYxGeRV7).
- 32 'Being LGBT in Asia: China Country Report', UNDP, Beijing (2014).
- 33 See footnote 56 and accompanying text.
- 34 Chin-Fu Hung, 'The Politics of Electronic Social Capital and Public Sphere in Chinese Lala Community: Implications for Civil Society' (2011) 2 *International Journal of China Studies Electronic Social Capital and Public Sphere* 2, 369-388; Elisabeth Lund Engebretsen, 'Intimate Practices, Conjugal Ideals: Affective Ties and Relationship Strategies among Lala (Lesbian) Women in Contemporary Beijing' (2009) 6 *Sexuality Research and Social Policy* 3, 3-14.

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

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

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

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

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

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

38 *Ibid*, Article 13.

39 *Ibid*, Article 18.

40 *Ibid*, Article 24.

41 *Ibid*, Article 33.

42 See below, Section 6.3.4.

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

Chinese activists have tactfully utilized the reformed registration system in the same-sex marriage litigation in early 2016.<sup>45</sup> Although filing the case was then already mandatory and thus almost effortless, and although it did not mean any endorsement of the authorities on same-sex marriage, the activists used the eye-catching words in the newsletters, such as 'making history!' and 'the first same-sex marriage case got successfully filed by court!'<sup>46</sup> which attempted to give the public an impression that Chinese authorities are taking same-sex couples' needs seriously.

Before moving on, it is important to mention the inconvenience of doing LGBT legal activism in China. In addition to the overall political sensitivity of (sexual) rights activism, there are other difficulties to mobilize the law in China, especially the ineffectiveness of Constitutional or human-rights protection of minority rights. In China's legal system, although the Constitution contains a broad range of human rights allegedly applicable to all citizens<sup>47</sup>, it is not litigable. In other words, the Constitution cannot be cited as a legal source in courts' decisions.<sup>48</sup> It is impossible to request judicial

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

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

45 See below, footnote 89 and accompanying text.

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

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

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

review of the constitutionality of a statute, nor is there a Constitutional court or the equivalent institute to deal with civil rights complaints. There also lacks a national human rights institution or Ombudsman<sup>49</sup> to implement or monitor the Chinese government's claimed commitment to the Constitution or to international human rights conventions.

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

### 6.3 LGBT ACTIVISTS' ENGAGEMENT WITH THE LAW

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

#### 6.3.1 Connecting with Lawyers

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

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

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

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

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

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

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

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

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

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

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

54 See Section 3.3.1.

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

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

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

Moreover, the existence of a group of allied Rainbow Lawyers and legal scholars may play an important precautionary role against potential backlashes. It has been argued that the major difficulties of LGBT activism in China lie in the nebulous laws and policies, not in well-organized religious-based opposition against LGBT rights as in some other Western or Asian countries.<sup>58</sup> However, if we acknowledge that the growth of legal activism is partly preconditioned on a resilient authoritarian regime<sup>59</sup> that tolerates certain conflicting values and speeches, then it is unsurprising that anti-LGBT activities based on religious belief or 'traditional culture' will emerge simultaneously with the increasingly visible LGBT groups. Connecting with LGBT-friendly lawyers can better support activists in a multi-cultural society.

### 6.3.2 Conducting Impact Litigation

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

56 See their Weibo account at [www.webcitation.org/6qYxlrHZE](http://www.webcitation.org/6qYxlrHZE).

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

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

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

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

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

On a side note, there have also been non-strategic court cases in China in relation to SOGIE, which may have wider influences on how lawyers and laypeople understand what is and should be lawful. There are already thousands of judgments containing the word ‘*tongxinglian*’ or ‘*jijian*’ in the online legal-case databases that do not even cover all the court cases in China before 2014.<sup>64</sup> It is impossible to make an exhaustive list of them. Some of the cases have been discussed in the previous chapters, such as the divorce litigation concerning mixed-orientation couples<sup>65</sup> and the case concerning the registration of a trademark containing the word ‘butch’<sup>66</sup>.

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

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

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

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

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

65 See Sections 3.4.2 and 4.4.1.

66 See Section 2.2.4.

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

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

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

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

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

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

Afterwards, Xiao Zhen brought a tort case to Beijing Haidian Trial Court in March 2014, claiming that Baidu and the Clinic had infringed upon his right to health<sup>68</sup> and the right of general personality<sup>69</sup>, and that both of the defendants had breached the law on advertisements by promoting deceptive information<sup>70</sup> – deceptive in that they claimed homosexuality can be treated without sufficient scientific evidence. In addition to mental damage compensation, he also requested the court to urge the defendants to apologize publicly.

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

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

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68 General Principles of Civil Law, Article 98.

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

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

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

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

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

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

Xiao Zhen, like many younger LGBT and feminist activists<sup>75</sup> who are more proactive and more alert to the disciplinary power of scientific discourses, was not content with simply being 'a little laboratory rat'<sup>76</sup>, passively waiting for the scientists' authoritative diagnosis. He preferred raising public awareness of homosexuality by engaging the court and the new media. Perhaps such divergence is less about the different personalities or the generational gap, but is conditioned on the changing social-legal landscapes concerning homosexuality in China in recent two decades as discussed before.

The decision of the case came in the end of 2014.<sup>77</sup> In its merits, the court made clear that 'homosexuality is not a mental illness, so the advertisement of conversion therapy is misleading'.<sup>78</sup> The clinic was required to compensate Xiao Zhen for 3500 RMB, and to apologize on its official website for

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72 See above, footnote 67.

73 See below, footnote 77.

74 Interview with Xiao Zhen, 20 June 2014.

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

76 See above, footnote 74.

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

78 *Ibid*, 12.

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

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

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

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

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79 Ibid, 15.

80 Ibid, 14.

81 See above, footnote 67.

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

83 See above, footnote 77.

84 See the pricing list on its website, at [www.webcitation.org/6g69pWyPj](http://www.webcitation.org/6g69pWyPj).

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

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

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

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

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

87 *Ibid.*

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

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

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

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

Another case that was not (yet) decided concerns the homophobic content in psychology textbooks. The plaintiff Qiu Bai, a then 20-year-old lesbian university student, brought a lawsuit against the Department of Education in 2015 for its failure to fulfill due diligence in examining textbooks that still pathologize and stigmatize homosexuals as 'sexual perverts', 'abnormal' or 'disordered'. Although the case was filed, Qiu Bai and the Department reconciled before the hearing, because the latter promised to establish a monitor and report mechanism. After the plaintiff withdrew the lawsuit, however, the Department refused to reply her written reports, and claimed that it was not within the scope of their responsibility. Qiu Bai has filed a lawsuit again, and the case was heard on 12 September 2016.<sup>95</sup>

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

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

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

92 See above, footnotes 43 and accompanying text.

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

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

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

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

97 *Ibid.*

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

For instance, the statement of attorney Simin Huang in the appeal of Sun and Hu's same-sex marriage registration case has referred to the marriage-right clauses in the Universal Declaration of Human Rights and in the ICCPR, as well as the equality and non-discrimination clause in the Chinese Constitution.<sup>100</sup> The lawyer also cited *Loving v. Virginia*<sup>101</sup> and *Obergefell v. Hodges*<sup>102</sup> in the United States to illustrate the historically changing meanings of marriage. The opening up of marriage to same-sex couples in 21 other countries<sup>103</sup> was also mentioned, so was the newly established civil partnership registration system in Kaohsiung city<sup>104</sup> in Taiwan. The statement ends with a quote from legal scholar Rudolf von Jhering, 'the path law goes through is not paved by flowers but blood. Notwithstanding thorns on the road, we will finally win the crown of rights.'<sup>105</sup> The eloquent words in the statement has received appreciation from many legal professionals and aspired numerous LGBT individuals. The reference to non-binding legal sources shows that lawsuits can have further-reaching meanings than requesting a judge to apply the positivist law to a specific dispute. As the issue of same-sex marriage arouses more debates in public, the non-formal legalities implied in the arguments of different sides may gradually become more competitive against the existing marriage law.

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

98 See above, footnote 48.

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

100 See Simin Huang, 'Thorns on the Road, We Will Finally Win the Crown of Rights: Statement of the Appellants' Attorney of the First Same-Sex Marriage Case in China (虽路遇荆棘, 终将摘权利王冠: 中国同性婚姻第一案二审代理词)', *Rainbow Lawyers*, 29 June 2016, at [www.webcitation.org/6rG8qgAJw](http://www.webcitation.org/6rG8qgAJw).

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

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

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

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

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

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

### 6.3.3 Lobbying the Legislators

Apart from strategic litigation, Chinese LGBT activists and their supporters have also actively engaged in legislative advocacy. One of the most salient attempts is the call for same-sex marriage. For several times since 2001, renowned sexologist Li Yinhe<sup>107</sup> has attempted to find representatives of the National People's Congress (NPC) and the Chinese People's Political Consultative Committee (CPPCC) to support her proposal to open up marriage to same-sex couples.<sup>108</sup> According to the Chinese Legislation Law, as Li is not a representative of the NPC, she has to lobby at least 30 representatives, who should then collectively introduce the bill to the NPC.<sup>109</sup> Unfortunately, to date no incumbent representative has openly supported her.

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

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

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

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

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

110 Legislation Law, Article 52.

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

Firstly, homosexuality<sup>111</sup> is not against the law in contemporary China. Homosexuals are Chinese citizens with full rights, and their demand for marriage is not in conflict with their rights as citizens.

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

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

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

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

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

...

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

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

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

112 See above, footnote 108.

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

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

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

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

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

116 Chang Meng, 'Student Calls for Same-Sex Marriage', *Global Times*, 28 February 2013, at [www.webcitation.org/6r2T7QTWH](http://www.webcitation.org/6r2T7QTWH).

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

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

In this regard, the Changchun City Ordinance on Preventing and Combating Domestic Violence<sup>121</sup> of 2009 used to be the most progressive local legislation in mainland China, because it defines ‘family members’ in an inclusive manner, so that same-sex partners and many other people can be protected. Article 2 of this Ordinance specifies, “‘family members’ in the present Ordinance refers to spouse, parents, children and *other family members* living together’.”<sup>122</sup> Technically speaking, the definition of ‘family members’ in this provision is circular, but the legislators seem to have intended to define ‘other family members’ much more broadly than blood, conjugal and in-law relatives in a household. As explained by the Deputy Secretary-General of Changchun municipal government, this Ordinance is ‘forward-looking, because it considers the future trends of diverse familial relationships in our city. It covers unmarried cohabiting couples, single-parent families, families composed of a single person and *same-sex*

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

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

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

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

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

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

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

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

Nevertheless, when asked at a press conference whether this provision included same-sex couples, Guo Linmao, a member of the Legislative Affairs Commission of the Standing Committee of the Congress, responded, 'Between homosexuals in our country, we have not yet discovered this form of violence, so, to give you a certain answer, it can be said that in this law people who cohabit does not include homosexuals.'<sup>127</sup> Guo's remarks were blatantly ignorant of the real-life cases and the data LGBT groups have long been exposing, which suggests his lack of information or his reluctance to acknowledge the existence of same-sex cohabitants and their needs.

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

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

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

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

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

127 'China passes first domestic violence law', *the Guardian*, 27 December 2015, at [www.webcitation.org/6odQd1tvp](http://www.webcitation.org/6odQd1tvp).

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

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

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

#### 6.3.4 Applying for Open Government Information

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

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

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

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

130 See above, footnote 86 and accompanying text.

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

There are some small but significant tips to increase the chance of making a successful OGI request, which LGBT activists have learnt via exchanging experience with other grassroots organizations. For instance, a public interest law firm Yipai has compiled a handbook on OGI, where it advises activists to use EMS<sup>133</sup> instead of other companies to deliver their files. This is because EMS is the only courier that can access the buildings of the governments, which may increase the chance of receipt.<sup>134</sup> They also suggest activists keep friendly communication with the government after filing the request, instead of passively waiting for the answers. It is unnecessary and impractical for grassroots organizations to always antagonize the government, says the handbook. Instead, a flexible tactic of combining OGI requests with complaints, recommendations, or thankyou letters may result in an optimal effect.<sup>135</sup> Administrative reconsideration is recommended as the least costly remedy for the applicant and the most responsive one, compared with the other two (reporting to the higher-level agency or filing an administrative lawsuit).<sup>136</sup>

About a week later, Fan received the reply from an SARFT official by phone, who told him that the requested information had already been disclosed, and referred him to a webpage. However, the ‘already-disclosed information’ was in fact only a procedural regulation about film censorship promulgated in 2010.<sup>137</sup> The substantial standards are still unknown, and

131 See above, footnote 39.

132 See e.g., ‘History-making! Someone Won the SARFT!’ *Sohu News*, 25 December 2015, at [www.webcitation.org/6odQxtSoL](http://www.webcitation.org/6odQxtSoL).

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

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

135 Ibid.

136 Ibid.

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

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

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

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

### 6.3.5 Resorting to International Mechanisms

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

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

139 See above, footnote 94.

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

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

In 2013, some Chinese LGBT activist groups, through the Sexual Rights Initiative,<sup>142</sup> submitted a shadow report<sup>143</sup> on LGBT Rights in China to its second cycle of the UPR.<sup>144</sup> The report covered a wide range of issues, including the incomplete depathologization, the classification of homosexual content as pornography, the biased sex education textbooks, employment discrimination based on SOGIE, marriage inequality, the restrictive political environment facing LGBT NGOs, as well as the limited access to hormone use and sex reassignment operations for transgender people. Accordingly, the report made 11 recommendations, including one that calls for same-sex marriage or domestic partnership laws.<sup>145</sup>

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

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

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

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

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

144 The information of the first cycle of UPR on China in 2009 can be found at [www.webcitation.org/6qe5faJph](http://www.webcitation.org/6qe5faJph); the second cycle was in 2013, at [www.webcitation.org/6qe5faJph](http://www.webcitation.org/6qe5faJph). There have already been submissions about SOGI issues in 2009: '26, There is no law or policy about same-sex sexual harassment and sexual violence, as highlighted by Sexual Rights Initiative (SRI). Homosexual marriage is not supported by law and homosexual people cannot adopt children...' see Summary of Stakeholders' Information, A/HRC/WG.6/4/CHN/3, 5 January 2009, at [www.webcitation.org/6qe65Mhxv](http://www.webcitation.org/6qe65Mhxv).

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

146 Interview with an anonymous activist, 25 February 2015.

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

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

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

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

'186.85. Accepted and already implemented

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

186.89. Accepted and already implemented

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

186.90. Accepted and already implemented

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

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

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

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

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

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

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

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

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

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

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

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

152 See above, footnote 30.

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

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

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

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153 See above, footnote 119 and accompanying text.

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

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

156 Information obtained from participant observation in the session.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### 6.4 CONCLUSION

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

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

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

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164 See Section 6.3.

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

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

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

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

This chapter has also shown a wide variety of, even dissonance in, the papers of different governmental agencies, officials' words, and courts' judgments, which suggests that what we call 'the Chinese government' is never a monolith. 'The Chinese government' does not have one coherent policy on SOGIE issues; its attitudes are often indeterminate and are contingent on the particular decision maker or spokesperson in a specific scenario. Such incongruence is for instance evident in the cases of the press conference of the Law Against Domestic Violence<sup>173</sup> and the CEDAW

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

168 See Section 6.3.2.

169 See above, footnote 155 and accompanying text.

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

171 See Section 6.2.

172 See Section 6.3.3.

173 See above, footnote 127 and accompanying text.

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

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

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

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174 See above, footnote 155 and accompanying text.

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

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

177 See Chapter 2.

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

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

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

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

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

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

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

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

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

Surely, it's a skill  
 But it can be learned  
 First you'll have to work on your handshake  
 Always look in someone's eyes  
 Do you believe in stories?  
 Or do you believe his eyes?

....

Just like a song you vaguely recognize  
 A beautiful refrain  
 It doesn't matter if you don't know the words  
 As long as you can make them up...

— Swelter, 'How to Fit in', from the album *Mountains for Everyone*, 2012

### 7.1 STRAIGHTJACKET REVISITED

Fitting in, fitting out, telling stories, or making them up. These are skills everyone had better master in order to be 'ordinary'. As this thesis has shown, an 'ordinary' family life in mainland China today is circumscribed by a series of imperatives: getting married at an 'appropriate' age and staying in a marriage, having children and grandchildren, and becoming old preferably with the care of one's offspring. Against this background, fervent debates are going on, online and offline, with regard to how same-sex-oriented people can deal with these imperatives, individually and collectively: Had we better stay low-profiled or come out to our friends, colleagues and parents? Should we stick to our true selves or bow to the reality? Is cooperative marriage a smart coping strategy against the marital and reproductive pressure, or is it a pathetic compromise? Are those who have chosen to marry an unwitting person of the different sex pitiful for having to live under pressure, or are they condemnable for ruining the efforts of gay people to gain respect and recognition from society? And, should same-sex marriage be the ultimate goal for making life easier for same-sex-oriented people, or do we have other options?

This thesis does not provide one-size-for-all answers. It instead brings into light two major lines of thinking buttressing the divergence on all the above questions. One is based on the epistemology of the closet,<sup>1</sup> which assumes the existence and importance of one's essential (homo)sexual self, the moral necessity to candidly reveal that truth in intimate relationships, the discomfort and shame of being kept closeted, as well as the liberating effect of coming out. The other relates to an epistemology of the straightjacket, which questions the essential, autonomous self and the

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1 See Eve Kosofsky Sedgwick, *Epistemology of the Closet* (University of California Press, Berkeley and Los Angeles, 1990).

'inner strength' against external pressure.<sup>2</sup> It also takes seriously the socio-economic-legal benefits of fitting in, as well as the unaffordable costs for the have-nots to be openly queer.

To recapitulate, the metaphoric straightjacket has several traits that cannot be captured by the idea of closet: 1) It is constraining, yet not just for gay people. While heterosexuals are often considered unnecessary to hide in the closet, the long sleeves of the straitjacket that regulates family life in all its capillaries actually strap over the (sexual) majority and minority alike.<sup>3</sup> 2) Unlike the cold, dark closet, the straightjacket does keep one warm and decent, indicating the emotional and material benefits of a normative family and the reasonable desire for such a safe net, which is again not gay specific. 3) Moreover, despite its suffocating effects similar to the closet, straightjacketing as a dynamic process is also a form of art, a stage magic where gimmicks can be deployed, agency exercised and thereby some free air obtained, which can be performed in both loud and silent ways.

These aspects of a normative family life have complicated the binaries of in/out, gay/straight, secrecy/openness, and lie/truth produced by the epistemology of the closet. The latter, by linking silence with oppression and non-disclosure with inauthenticity, leads to a commonsense understanding of Chinese 'gay'<sup>4</sup> people in mixed-orientation or cooperative marriages as simply perpetrators of 'marriage fraud', performers of cunningly scripted plays, or victims of the society's homophobic silencing. These images are largely based on a 'repressive hypothesis':<sup>5</sup> the mainstream society endeavors to suppress homosexuality, whereas homosexual subjects are eager to live openly if they can. This is partly true if we look at some lesbian- or gay-identified people's hard time in the closet and, in contrast, their feeling of emancipation after finally coming out, especially to their parents.<sup>6</sup>

However, pushing same-sex-oriented people into the closet, especially into a straight-looking marriage, is but one form of oppression. Let us remember Sedgwick's caveat on the double bind that gay people are perpetually struggling with: homophobia often insists on not only refusing to know but also knowing more about gay people; the disclosure is thus 'at

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2 For the individualistic discourse on being mentally strong and coming out, see Chapter 3, footnote 84, and Chapter 5, footnote 76 and accompanying text.

3 Yoshino elaborated this point eloquently: 'angry straight white men ... are understood only as impediments, as people who prevent others from expressing themselves, rather than as individuals who are themselves struggling for self-definition. No wonder they often respond to civil rights advocates with hostility'. See Kenji Yoshino, *Covering: The Hidden Assault on Our Civil Rights* (Random House, New York, 2006) 25.

4 Quotation marks are used here to emphasize that not all same-sex-oriented people have a gay identity yet are often arbitrarily categorized and judged as such.

5 Michel Foucault, *The History of Sexuality* (Pantheon Books, New York, 1978) 10.

6 For coming-out-to-parent stories, see Sections 5.2.1 and 5.2.2.

once compulsory and forbidden'.<sup>7</sup> As shown in the denunciation of 'gay frauds', one can be 'faulted for not disclosing enough rather than disclosing too much about her or his sexuality'.<sup>8</sup> In other words, in addition to the oft-discussed compulsory heterosexuality,<sup>9</sup> another powerful yet less criticized imperative on same-sex-oriented people is 'compulsory confession'.<sup>10</sup> Coming out and telling more personal stories about being gay may be an anti-dote to the former form of homophobia, but it plays right into the latter one.

Therefore, this thesis argues that to tackle the two contradictory demands, i.e., compulsory heterosexuality *and* compulsory confession, same-sex-oriented people should deploy two seemingly paradoxical strategies contextually. Assertively coming out tackles the erasure of homosexuality (as evident in the eye-catching lawsuit against film censorship over homosexual scenes and that against conversion therapy);<sup>11</sup> meanwhile, pragmatically entering into a straight-looking familial life path (even without full disclosure) challenges the confessional underpinning of the call for 'being your true self' and 'living under the sunlight'. More importantly, each approach is limited without one another. If being 'out and proud' becomes the only moral choice, then we may interpret silence too narrowly as complicit with oppression, which delegitimizes the vast number of silent subjects who do not come out as LGBTs or even do not self-identify as such. However, if passing in the straightjacket becomes the only profitable option, then we fail to create alternative spaces for those who do find it suffocating and who are unreasonably disadvantaged as family outlaws.

In other words, visibility and secrecy are both worth valuing and should not be antagonized. Of course, people at different positions may weigh them differently, thus showing diverging life paths, the legality and morality of which should not be pre-judged. That means if neither full transparency nor sheer darkness is desirable for same-sex-oriented people, then a certain level of opacity, ambiguity and elasticity is needed, both in

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7 See Sedgwick, *Epistemology of the Closet* (1990) 70; see also, Nicholas de Villiers, *Opacity and the Closet: Queer Tactics in Foucault, Barthes, and Warhol* (University of Minnesota Press, Minneapolis and London, 2012) 3.

8 Ibid. See also, Jingshu Zhu, "'Unqueer" Kinship? Critical Reflections on "Marriage Fraud" in Mainland China' (2017) *Sexualities*, DOI 10.1177/1363460717719240.

9 See Adrienne Rich, 'Compulsory Heterosexuality and Lesbian Existence' (1980) 5 *Signs* 4, 631-660.

10 As Foucault rightfully pointed out: 'An imperative was established: Not only will you confess to acts contravening the law, but you will seek to transform your desire, your every desire, into discourse ... [S]ex had to be put into words', see Michel Foucault, *The History of Sexuality (Volume 1: An Introduction)* (Pantheon Books, New York, 1978),) 21, 32. Like Rich (ibid), my use of 'compulsory' does not necessarily suggest certain force or threat that push people to confess; instead, the very voluntariness of coming out can be part of the socially constructed 'compulsion'. I appreciate Xiaofei Guo who helped me think through the mechanism of 'compulsory confession' (in Chinese 强制坦白).

11 See above, Sections 6.3.2. and 6.3.4.

daily life and in law. The next questions are: to what extent is the existing Family Law serving this need? How do people interact with the law for different goals? And, what can be done to make the law friendlier for both those who are 'out-and-proud' and those 'on-the-down-low'<sup>12</sup>?

## 7.2 A PLURALIST FRAMEWORK OF FAMILY LAW

This thesis has taken a pluralistic approach to understand the law, which is informed by the analytical framework of Family Law (FL) 1, 2, 3, and 4 proposed by Halley and Rittich.<sup>13</sup> Throughout the chapters, this framework has reminded us of the various legal and social norms that work together with and beyond the 'hardcore' statutory family law. Highlighting the inherent connections between FL1, 2, 3, and 4 allows us to study family with a broadened vision. Here I give a non-exhaustive list of the prototypical Family Law 1, 2, 3, and 4 that have appeared in previous discussions.

FL1 refers to codes, cases and interpretations regulating the commonly recognized family-law issues such as marriage, divorce, parenthood, and inheritance. The titles of these laws directly tell us its focal points (Table 1). The cluster of FL1 sets the framework of how the state's legal system defines and regulates normative families: what kind of relationships are idealized (i.e., caring and nurturing families based on different-sex, monogamous and reproductive marriages), what are forbidden (e.g., abandoning dependent family members, domestic violence, or having different-sex extra-marital affairs), and what are not even legally visible (e.g. having same-sex extra-marital affairs).<sup>14</sup> FL1 also prescribes dispute-settling mechanisms concerning property, custody and succession, and throughout the disputes and the courts' judgment, the ideal family is repeatedly announced and reinforced. Due to its black-letter nature, FL1 is the most difficult to negotiate away or circumvent for same-sex partners who want to establish a family of their choice. This is partly why many same-sex-oriented people would rather choose to enter into different-sex marriage, with or without disclosure, so as to enjoy the wholesale conveniences for heterosexual couples, at least before marriage is opened up for same-sex ones.<sup>15</sup>

12 'Down-low men' is often used to refer to the African- and Latino-American married same-sex-oriented men who have casual homosexual sex outside marriage without letting their wives know, see e.g., Lincoln Pettaway and others, 'Becoming Down Low: A Review of the Literature on Black Men Who Have Sex with Men and Women' (2014) 14 *Journal of Bisexuality* 2, 209–221. There are few discussions of Asian men under this term.

13 Janet E Halley and Kerry Rittich, 'Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism' (2010) 58 *American Journal of Comparative Law* 753–776.

14 See Section 2.2.5.

15 These conveniences are especially important when giving birth in China requires cumbersome administrative procedures. See Section 4.5.1.

Table 1: Examples of FL1

Title of Law	Provisions that Set the Framework of a Normative Family	Reference
Marriage Law	Article 2, A marriage system based on the free choice of partners, on monogamy (the Chinese term is literally 'one husband and one wife') and on equality between man and woman shall be applied.	Section 3.1.1
Adoption Law	Article 10 (2), Where a person with spouse adopts a child, the husband and wife must adopt the child in concert.	Section 4.2.4
Law on Succession	Article 10, The estate of the decedent shall be inherited in the following order: First in order: spouse, children, parents; Second in order: brothers and sisters, paternal grandparents, maternal grandparents.	Section 5.1.6

FL2 covers the legal fields that do not primarily regulate familial relationships but still use the terms describing familial relationships, such as 'spouse' or 'next of kin', in some provisions. These terms serve as a dividing line, centering 'normal' families and excluding others (Table 2). That is why the 'public' business relations and welfare system, seemingly irrelevant to the 'private' familial relationships, are nevertheless always 'in the shadow of marriage law'.<sup>16</sup> Like FL1, these laws are also difficult to avoid or challenge if the legal definitions of marriage and family remain.

Table 2: Examples of FL2<sup>17</sup>

Field of Law	Provisions that Center the Normative Family	Reference
Labor Law	Bereavement leave is granted only when one's lineal relative (spouse, parents and children) deceases	Section 3.1.1
Insurance Law	Articles 12 (3) and 95, Beneficiary of life and health insurance can only be next of kin	Section 5.1.2
Tax Law	Spouses are exempted from the burdensome deed tax	Sections 3.1.1 and 3.4.1
Criminal Procedure Law	Articles 73 and 83, The family members of a suspect shall be notified within 24 hours after he is detained	Section 3.1.1

FL3 refers to the legal rules that contribute structurally but silently to the ways in which family life is lived. These laws may not even contain any words in relation to marriage or family, but are nevertheless influencing how same-sex-oriented people are treated in their social surroundings, and subtly affecting their status vis-à-vis the notion of family. Several FL3 rules are thoroughly discussed in Chapters 2 and 6. The ambiguous terms in FL3 such as 'healthy', 'morality' and 'socialist spiritualization' (which also relate to FL4) are often disadvantageous to same-sex-oriented people (Table 3).

16 The overarching, shadowy effects of marriage law has been discussed in Section 1.2.

17 More examples of FL2 are summarized in Table 5, where the dividing line is not necessarily 'spouse' or 'next of kin'.

In judicial practices, these words are easily interpreted in a way that marks same-sex-oriented people as hypersexual, indecent, immoral and thus unsuitable for a wide range of social activities, including being shown on TV or trademarks, establishing organizations, and implicitly, forming a family.

Table 3: Examples of FL3<sup>18</sup>

Title of Law	Provision that Can be Used to Disparage Same-Sex-Oriented People	Reference
Measures Ensuring that Broadcasts, Television Programs and Films Strengthen and Correct the Moral Character of Adolescents	Paragraph 15: ...Unhealthy content related to sex, such as lines, scenes and plots that promotes sexual freedom, casual sex, sexual pleasure and homosexuality should be cut out.	Section 3.1.1
Trademark Law	Article 10.1.8: The following signs shall not be used as trademarks: ... those detrimental to socialist morals or customs, or having other unhealthy influences.xx	Section 4.2.4
Regulations for Registration and Management of Social Organizations	Article 4: social organizations shall observe the constitution, state laws, regulations and state policy, and shall not offend social morality.	Section 5.1.6

FL4 are not state-promulgated binding laws, but are a wider range of informal norms that give meaning to FL1, 2, 3 and push people towards conformity without coercion. Some FL4 norms sustaining heteronormative morality are codified into state law, as shown in the abovementioned examples of FL3, and some others repetitively appear in mainstream media and in our everyday life in the forms of beliefs, proverbs, rituals, and customs (Table 4). These norms are tacitly yet powerfully shaping people's perception of what is lawful and reasonable, the breach of which thus may bring about heavy moral condemnation, and sometimes even legal disadvantages. With its profound socio-cultural legitimacy, FL4 norms are often unmarked, inert and do not have instantly observable traces of change, but the efforts to reconfigure them can be as influential as litigation or legislative lobbying directed to FL1, 2 and 3.

18 See Section 2.2.4.

Table 4: Examples of FL4 that Influence Family Life

Informal Familial Norms	Reference
Hetero-romantic-sexual love has nowadays become an ideal package that justifies the morality and happiness of coupledness	Sections 3.3.2 and 3.4.2
Men and women are expected to take on different roles in family and at workplace; the financial ability is men's entrance ticket to the dating pool	Section 3.1.3
A daughter-in-law is expected to show courtesy towards the elders	Section 3.3.1
Adoptive children are deemed not as close as biological ones	Section 4.3.3
The superstition that marriage and procreation can counterbalance bad luck (chongxi) have pushed some young people to marry hastily	Section 3.4.2
The commonplace idea that housework and child-rearing labor are 'invaluable' makes these efforts oftentimes unpaid and unappreciated	Section 4.5.2
The folks' saying that 'bring up sons for help in old age, and store up grains against famine' makes many same-sex-oriented young adults and their parents worry about the non-reproductive future	Section 5.1
The bundling of care (xiao) and submission (shun) in the conventional understanding of 'filial piety' also puts pressure on both generations.	Section 5.2

While these norms often make same-sex-oriented people living in contemporary China feel suffocated, some other FL4 can serve as a powerful resource when written law is ambiguous or disadvantageous. For instance, some respondents have skillfully used '*guanxi*' (social connection) to surf the legally grey or even forbidden areas,<sup>19</sup> and the Party slogan in Socialist China of 'Self-Reliance and Hard Work' have also justified and even glorified the two rural women's cohabitation.<sup>20</sup>

Closely related to the pluralistic conception of Family Law is the multiplicity of tactics the law deploys to regulate homosexuality and make them family outlaws. More specifically, as shown in Chapter 2, after the repeal of the criminal offence of hooliganism, the criminal and administrative rules still penalize certain same-sex behaviors among consenting adults, such as commercial or group sex.<sup>21</sup> The laws on public health, including HIV / AIDS and blood donation, serve to both shame and domesticate same-sex desires and behaviors.<sup>22</sup> The 'symbolic annihilation' of same-sex representations and signs, including films and trademarks, has made both the sexual and non-sexual aspects of same-sex-oriented people's life invisible in public spheres.<sup>23</sup> The obstruction of their lawful association prevents them from cultivating stronger communities.<sup>24</sup> The heteronormative marriage law turns a blind eye on same-sex relationships, punishing infidelity between

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19 See Section 4.3.1.

20 See Section 5.3.1.

21 See Section 2.1.

22 See Section 2.2.1.

23 See Sections 2.2.3 and 2.2.4.

24 See Section 2.2.2.

people of different sexes only, leaving a legal lacuna regarding one's extramarital affairs with a person of the same sex.<sup>25</sup> Overall, this chapter shows that Chinese laws often refrain from speaking loudly about homosexuality, but paradoxically have to shout its name out to erase it. This has created both opportunities and challenges for legal changes.

The chapter on activism (Chapter 6) reflects upon the various social and legal advocacy Chinese LGBT activists have carried out in recent years. Although only a few issues Chinese LGBT activists brought forward (same-sex marriage and domestic violence) are directly related to FL1, all the other ones, including conversion therapy, homophobic textbooks, film censorship and refusal of NGO registration, are FL3 and 4 that co-construct what a 'normal', legally protected family should look like. Without challenging the stigmatic images of homosexuals in these fields, the call for legal recognition of same-sex relationships would not be possible. Meanwhile, the strategies of challenging these laws are also numerous: litigating, lobbying the legislators, educating the lawyers, filing OGI requests, and making claims at the UN.<sup>26</sup> In these processes, the relations between the authorities and the activists are more dynamic than merely confrontational, as shown in the CEDAW country review.<sup>27</sup> These ongoing activities will keep changing the living conditions of same-sex-oriented people in China, and thus also influencing on their familial arrangements.

### 7.3 DEALING WITH FAMILY LAW ON DIFFERENT PATHS

Related to the pluralist framework of Family Law, the notion of legal consciousness is used in this thesis to examine two major interactive 'pull-and-push' forces in the operation of law: it looks at how the law plays a part in constructing people's daily life, their desires, identities and relationships, and how ordinary people deal with the hegemonic laws and create competing legalities in various ways.

Through the ethnographic stories, we have seen different familial paths Chinese same-sex-oriented people take, including 1) not marrying a person of the different sex, but staying single or living with one's same-sex partner(s); 2) marrying a consenting same-sex-oriented person of the different sex (cooperative marriage); and 3) perhaps most commonly, marrying a person of the different sex (mixed-orientation marriage). Each path can be further bifurcated, depending on whether their parents and/or spouses are informed of their orientation. These paths are partly paved by Family Law 1, 2, 3, and 4, especially the norms on marriage, parenthood and eldercare.

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25 See Section 2.2.5.

26 See Section 6.3.

27 See Section 6.3.5.

More specifically, marriage is the central institution from which a normative family life unfolds (Chapter 3). In contemporary mainland China, marriage has been tied up with housing, *hukou* (residence registration), social welfare, intra-China mobility, employees' rights, parental rights and old-age security in times of economic uncertainty. Such an appealing package is constantly prompting people to get married and stay in marriage, while disadvantaging the non-conformists.<sup>28</sup> As an imperfect institution, however, marriage often fails to provide its promised ideal package of romantic love, passionate sex, harmonious family life and altruistic sharing and caring.<sup>29</sup> Even so, it is still desirable for many, as an indication of normalcy and a coupon for numerous benefits.

Closely related to the marital imperative is the pressure to become parents (Chapter 4), especially for women at their 'best reproductive age'. The pressure is even heavier for the generation born under the one-child policy that only ended nationwide in 2016. Moreover, dual-parenthood based on formal, different-sex marriage still occupies a legally and culturally superior position, although children of single parents, adopted and out-of-wedlock children are legally recognized. Only legally married couples can get a 'birth permit', and only with this certificate can a child be legally delivered and registered as a lawful resident.<sup>30</sup> Similarly, only different-sex married couples are allowed to adopt a child jointly.<sup>31</sup> Step-parent adoption is only valid within different-sex marriages, and foreign homosexual individuals or couples are explicitly forbidden to adopt Chinese children because homosexuality is deemed 'unhealthy' and 'immoral'.<sup>32</sup> Restriction also shows in fostering.<sup>33</sup> Surrogacy is completely banned in mainland China, and the access to assisted reproductive technologies is closely tied up with marriage, too (with an unproved exception of a bylaw in Jilin).<sup>34</sup>

The marriage and reproductive imperatives are both highly gendered, posing different expectations and pressure on men and women.<sup>35</sup> For instance, men are expected to have their biological children, even without marriage, as many parents of gay men have expressed;<sup>36</sup> on the other hand, women are pressured into both marriage and motherhood, and it seems that with the rising of their economic independency and feminist awareness, more and more same-sex-oriented women are now dare to refuse or negotiate with the reproductive imperative, which is vividly demonstrated by the tensions between some cooperatively married couples.

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28 See Section 3.1.1.

29 See Section 3.1.2.

30 See Section 4.2.1.

31 See Section 4.2.4.

32 Ibid.

33 See Section 4.2.5.

34 See Section 4.2.6.

35 See Sections 3.1.3 and 4.1.

36 See Sections 4.3.2 and 5.2.2.

The laws in relation to old age also influence people's familial arrangements. The beneficiaries of social security and commercial life insurance in China are both restricted within spouses or next of kin. The same goes for statutory succession.<sup>37</sup> However, the actual legal inconvenience in old age outside of normative family is less worrisome than people tend to assume, as shown in the laws on surrogate medical decision, living organ donation and continued tenancy, which all give openings to non-familial interdependent relationships.<sup>38</sup> It can thus be said that the ageing anxiety is more related to FL4, where the imagination of a happy old age is primarily linked with filial piety (*xiao shun*), a moral-legal obligation that expects obedience, adjacency, economic and emotional support all at once.

Interacting with the laws on the marriage-parenthood-eldercare straight-jacket are three prototypical schemas of legal consciousness – 'before' (obeying or bowing to) the law, 'with' (utilizing or playing with) the law and 'against' (avoiding or rejecting) the law.<sup>39</sup> All of them can be found in my respondents' lived experiences, and oftentimes in the same person in a single life event. Next, I would briefly review the legal consciousness shown in each of the three main relationships: same-sex partnership, cooperative marriage and mixed-orientation marriage.

Same-sex couples living outside of the marriage institution in China have to deal with the law's blindness on their relationships. For instance, the property dispute of a cohabiting same-sex couple is regulated by laws on business partners instead of the rules on common property in Marriage Law.<sup>40</sup> Inconveniences also show in obtaining birth permit, adoption, succession, insurance, medical care, etc.<sup>41</sup> Despite the legal exclusion, same-sex couples are creating informal legalities in their own ways. Some use weddings without marriage to gain public legitimacy for their relationship, and a lesbian couple have given new meanings to their real-estate certificate as if it were a marriage certificate.<sup>42</sup> They have made full use of the de facto adoption (*guoji*) to form their families, or use social connection (*guanxi*) to carry out in vitro fertilization in a public hospital that is otherwise impossible.<sup>43</sup> They have come up with all sorts of eldercare plans, such as preparing for rainbow nursing homes or developing intergenerational same-sex love/friendship/kinship.<sup>44</sup> Some cultural-political discourses are also appropriated for them to legitimize their relationships, as evident in the two elderly ladies who call their life-long cohabiting relationship as 'self-reliance', a popular communist party line in 1950s till the late 70s.<sup>45</sup>

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37 See Section 5.1.2 and 5.1.6.

38 See Sections 5.1.4, 5.1.5 and 5.1.7.

39 See Section 1.3.

40 See *Gao v. Han* in Section 3.2.3.

41 See Sections 4.2 and 5.1.

42 See Section 3.2.2.

43 See Sections 4.2.4 and 4.2.6.

44 See Section 5.3.2.

45 See Section 5.3.1.

Cooperative marriage is also a relationship where comfort, constraints and resistance coexist. Once married, the cooperative lesbians and gay men have to lead their life according to the formal and substantial rules on marriage. This gives them much expediency in purchasing real properties in some cities and giving birth to children through lawful procedures. Meanwhile, they are also bound by the social norms that circumscribe a culturally intelligible marriage, such as the obliged show-up in the other's family gatherings, and the expectation of a wife to serve tea for a mother-in-law.<sup>46</sup> They have exercised agency to customize their marriages and gain some free air: they may sign prenuptial agreements, or at least verbally negotiate the rights, obligations and exonerations of each party; they tend to worry less about divorce; they often show a greater level of egalitarianism, although some gendered cultural expectations can hardly be negotiated away; they are also more likely to challenge the normativity of monogamy, since the existence of their extra-marital same-sex relationships have already made them to some extent non-monogamists.

Mixed-orientation marriage is the most controversial way in which same-sex-oriented people deal with the straightjacketing imperatives. The 'gay' men are often condemned as having committed 'marriage fraud' and 'womb fraud', if they form a family with a straight spouse without informing her of his sexual orientation. Like any different-sex marriage, the same legal rules on property, infidelity, parenthood, succession and medical care almost invariably apply to mixed-orientation marriages, except for cases where judges would take the stigmatic image of homosexuality into consideration in custody.<sup>47</sup> Moreover, the existing law does not have any punitive rules on same-sex extra-marital affairs, which is partly why the *tongqis* (wives of 'gay' men) feel ignored resort to mass media, hoping the public shaming of their 'fraudulent gay husbands' can do them justice. In contrast with the over-simplified media representation of *tongqis'* stories, however, I have encountered in my fieldwork various ways of dealing with such marriages: to maintain friendship instead of romantic love in marriage, to create some physical space from each other, to trivialize sex life, to communicate candidly, to experiment with non-monogamy, and to critically reflect upon the socio-legal straightjacket that gives few livable alternatives for both spouses.<sup>48</sup>

The before-, with- and against-the-law practices in all the above forms of relationships and occasions have shown us that the law can be 'both sacred and profane, God and gimmick, interested and disinterested, here and not here'.<sup>49</sup> Moreover, as these co-existing, overlapping schemas of legal consciousness sediment in more and more people's lived experiences,

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46 See Section 3.3.1.

47 See Section 4.4.1.

48 See Section 3.3.2.

49 Silbey and Ewick, *The Common Place of Law* (1998) 223.

they are prone to create informal legalities that can then compete with the official one that defines and regulates family life. Such competition and transformation is happening not simply at the textual or behavior level, but in a more embodied way.

#### 7.4 THE EMOTIONS OF LAW

The legal consciousness theory is not *just* about describing and categorizing people's thoughts and behaviors. More importantly, it is a critical tool to challenge the formal law's hegemony, through constructing diverse legalities in everyday life. However, previous literature has not told us how exactly different meanings of law are made and unmade, by what discursive, material and affective forces. One of the limits of the notion of legal 'consciousness' is that it seems to assume a rational subject, who acts 'consciously' before, with or against the law for his best interest. But are these behaviors generated from rational decision-making only?

Without antagonizing reason and feeling, which are both somatic and semantic, I found a recurring theme in many stories told in this thesis: the indispensable role emotions play in people's push-and-pull interaction with the law. In other words, law participates in molding our feelings and vice versa. Personal and intimate as they are, feelings are simultaneously informed by social conventions, institutions and laws, as Williams points out in his elaboration of the structure of feelings.<sup>50</sup>

For instance, the pressure to marry, the stress to procreate and the fear of aging tragically is strongly felt in same-sex-oriented people. The anxiety of 'no future' is closely related to the feeling of being 'abnormal', being left out, and being undervalued, which are all written explicitly or implicitly in laws that pamper the hetero-familial good-life fantasy and prejudice the non-normative existence. Although most of my respondents do not know the specific legal provisions, they can easily find out their unprotected status when they encounter the inconvenience in almost every aspect of family life. These unpleasant experiences may make many same-sex-oriented people feel unconfident and pessimistic, thus having a stronger impulse to act 'before the law' and live a straightjacketed life.

Another example of the law's emotion-producing effect can be found in the widespread anger and hatred of *tongqis* against 'gay frauds'. Such strong feelings are not merely a matter of personal traumas, but are also socially produced, replicated and circulated, like a form of capital,<sup>51</sup> especially through *tongqis'* online discussion and media coverage. *Tongqis'* discontent and homophobic aversion is partly instigated by the manifestation of law

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50 Raymond Williams, *The Long Revolution* (Pelican Books, Middlesex and Victoria, 1965) 64-65.

51 Sara Ahmed, 'Affective Economies' (2004) 22 *Social Text* 2, 117-139.

in daily life: women's unpaid labor in marriage and reproduction is often unappreciated in marriage law and divorce cases; the courts' legalistic judgments concerning 'fraudulent marriages' do not favor the wives even if they have robust evidence of their husbands' cheating with men; and the pejorative language used in the media coverage of criminal cases concerning promiscuity, AIDS and drugs of gay men<sup>52</sup> further justifies the panic against homosexuality. Conversely, these feelings have also motivated some *tongqis* to come out in public, hoping to convince the judges and legislators to see and punish the 'frauds'.<sup>53</sup> As we recalled in the previous section, there are other feelings in mixed-orientation marriages, yet they are much less attended in media and academia. In return, *tongqis'* victimized feelings, as an important part of the dominant discourse of 'marriage fraud', can influence the legal authorities' attitude, as evident in the Beijing First Intermediate Courts' non-binding legal report that sides with *tongqi* and stigmatizes married 'gay' men.<sup>54</sup>

Importantly, in addition to stress, anxiety, grudges and hatred, other feelings are also emerging in the life of same-sex-oriented people. One is a certain degree of easiness, as exemplified by laughter of the two old ladies despite the bitterness in life.<sup>55</sup> We also see the comrade sentiments emerging from the shared stress and anxiety, as evident in the relatively egalitarian cooperative parenting experience between some lesbians and gay men,<sup>56</sup> and in the idea of collective eldercare among PFLAG parents or same-sex-oriented elders.<sup>57</sup> There is a feeling of kinship, too, as shown in my deep attachment with some respondents,<sup>58</sup> and in several mixed-orientation and cooperative marriages.<sup>59</sup> And we have seen the confidence in the 'friendship as a way of life', borrowing Foucault's term,<sup>60</sup> in the joyful, living-in-the-moment relationship between the old man and his multiple 'friends/lovers/sons'.<sup>61</sup> All these feelings of can arguably be forms of 'queer optimism'<sup>62</sup>, which may lighten some heavier moods that are often deemed as the key tone of queer life in China and elsewhere.

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52 For instance, A popular legal education program on the Chinese party-state's central television, Legal Report, has demonized homosexuality in 'Dangerous Relationships', 13 February 2015, at [www.webcitation.org/6r2SLSG7](http://www.webcitation.org/6r2SLSG7).

53 See the report on mixed-orientation marriage of the Beijing Intermediate Court, in Section 2.2.5.

54 See Section 2.2.5.

55 See Section 5.3.1.

56 See Section 4.5.2.

57 See Sections 5.2.2 and 5.2.3.

58 See Sections 5.3.1.

59 See e.g., *tongqi* Rou's story in Sections 3.2.2 and Fish's gratitude to her cooperative gay husband in 5.2.1.

60 Michel Foucault, 'Friendship as a Way of Life' in Paul Rabinow (ed), *The Essential Works of Foucault, Volume I, Ethics: Subjectivity and Truth* (The New Press, New York 1997)

61 See Section 5.3.2.

62 Michael D Snediker, *Queer Optimism: Lyric Personhood and Other Felicitous Persuasions* (University of Minnesota Press, Minneapolis and London, 2009).

Understandably, social movements tend to prefer using tragic stories to arouse the empathy of the public. In order to change the written laws, activists need to explain why the current rules are shortsighted, discriminatory and even painfully oppressive. To that end, tears and outcry do work.<sup>63</sup> However, these strategies are not enough. For LGBTs, the sense of community should not only be built on the collective memories of being marginalized, but also feelings of care, warmth, pleasure and indeed hope. The representation of a full range of feelings can do justice to the rich lived experience of same-sex-oriented people. Only when the rigorous arguments about gay rights circulate together with various embodied feelings, can Family Law (especially FL4) be changed in a more profound way, a way that addresses these widely shared feelings regardless of sexual orientation or marital status.

## 7.5 BEYOND-MARRIAGE APPROACH OF LGBT LEGAL ACTIVISM

With the increasing LGBT visibility in media and in daily life, Chinese legislatures and courts can no longer avoid answering some tricky moral-legal questions: If the law were to illegalize those extra-marital same-sex affairs that bother the straight monogamous spouses, what about the same-sex relationships that do not intrude into others' marriage? If the law were to punish illegal child-bearing and -rearing by same-sex-oriented people outside of marriage, then should they be given lawful routes towards parenthood? If the law encourages people to 'go home often' and privatizes eldercare responsibilities, what kind of 'home' is ready to accommodate same-sex-oriented 'family outlaws'?

One solution to these questions is to open up marriage for same-sex monogamous couples, so that they can form their own legally valid families, with a whole package of rights and obligations as previously granted to their different-sex counterparts. As marriage equality has become a hot topic in LGBT movements worldwide, China has seen same-sex marriage campaigns in recent years as well.<sup>64</sup> While it is important for same-sex-oriented people to equally enjoy the rights attached to marriage, fitting into this institution may not be the only way out. The idea of straightjacket being a constraint for both straight and gay can further help us to think LGBT (legal) activism in a more inclusive way.

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63 One of the most frequently told prototypical sad stories worldwide is that of an old same-sex couple unable to make medical decision for each other. For more analysis of this story and its legal inaccuracy in Chinese context, see Section 5.1.4.

64 See Sections 6.1 and 6.3.2.

In the previous chapters, we have seen some laws with open-ended wording than ‘spouses’ or ‘next of kin’, which may be used in a way that benefits same-sex-oriented people. Of course, these vague terms do not directly guarantee gay rights unless interpreted more unambiguously by the legislative or judicial bodies. However, the potential for gay-friendly interpretation of existing laws at least has points to us a sporadic route of rights advocacy, namely, the ‘beyond-marriage approach’. This approach was first proposed by some scholars, lawyers and activists in North America as an alternative to or complement of marriage equality.<sup>65</sup> It is argued that different-sex marriage, or even same-sex marriage, should not be used as a dividing line for the eligibility for most legal rights; the contemporary values embodied in each particular law should.<sup>66</sup> In fact, as shown in the table below, there are many profound values that transcend people’s sexual orientation and marital status, including best interests of the child, women’s reproductive rights and autonomy, non-violence, as well as the attachment between interdependent adults in important health- and money-related decisions (Table 5).<sup>67</sup>

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65 The beyond-gay-marriage approach has been discussed in Polikoff, *Beyond (Straight and Gay) Marriage* (2008); Michael Warner, ‘Beyond Gay Marriage’ in Wendy Brown and Janet E Halley (eds) *Left Legalism/ Left Critique* (Duke University Press, Durham and London, 2002) 259-289. See also, a jointly signed document by a group of lesbian, gay, bisexual, and transgender and allied activists, scholars, educators, writers, artists, lawyers, journalists and community organizers: *Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families and Relationships*, 26 July 2006.

66 Polikoff, *Beyond (Straight and Gay) Marriage* (2008).

67 *Ibid*, 137-143.

Table 5: Laws with Beyond-Marriage Values and Wording

Value	Legal Issue	Legal Source	Beyond-Marriage Wording	Reference
<b>Best Interests of the Child</b>	De facto Adoption ( <i>Guoji</i> )	Supreme People's Courts Opinions on Several Problems in Implementing Civil Policies and Laws (1984)	'having established a <i>caretaking relationship</i> '	Section 4.2.4
	Fostering	Policy of a Child Welfare agency in Zhongshan city (2010)	' <i>appropriate for foster caring, not limited to "complete families"</i> '	Section 4.2.5
	Guardianship	General Principles of Civil Law (1986), Article 16(2)	'any other closely connected relative or friend willing to bear the responsibility of guardianship...'	Section 4.2.3
<b>Reproductive Rights and Autonomy</b>	Medically Assisted Reproduction	Regulations of Jilin Province on Population and Family Planning (2002), Article 30(2)	'women who decide not to marry...'	Section 4.2.6
<b>Anti-Violence</b>	Domestic Violence	Law Against Domestic Violence (2016), Article 37	'those living together who are <i>not</i> family members'	Section 6.3.3
<b>Adult Interdependency (Health)</b>	Medical Decision in Emergency	Administrative Regulation on Medical Institutions (1994), Article 33	'the agreement and signature of his or her family member or a <i>related person</i> '	Section 5.1.4
	Living Organ Transplantation	Regulation on Human Organ Transplantation (2007), Article 10	'having developed a familial relationship ... for reasons like assistance and support'	Section 5.1.5
<b>Adult Interdependency (Economy)</b>	Statutory Succession	Law of Succession, Article 14	people other than a successor who were <i>largely responsible for supporting</i> the deceased, or who had <i>depended on the support of</i> the deceased	Section 5.1.6
	Legacy-Support Agreement	Law of Succession, Article 31	'a person who... assumes the duty to support the deceased in his or her lifetime and attends to his or her interment after death'	Section 5.1.6
	Continued Tenancy	Contract Law (1999), Article 234	' <i>jointly living</i> in the unit with the lessee'	Section 5.1.7

In other words, many legal dilemmas this thesis has brought to light are not gay-specific, but are influencing all unmarried people as well, so the answers do not have to be based on same-sex couples' right to marry only. In addition to coming out and fighting for marriage equality, LGBT activists can invest more on establishing alliance with other disadvantaged groups (such as cohabiting heterosexual couples, unmarried heterosexual women who want to access the sperm bank, or elders who have no family members to reply on), so as to make legal changes for a wider range of beneficiaries. So far, few attempts have been made in China to push the authorities to interpret these words more explicitly friendly to same-sex couples and other subjects and relationships outside marriage and biological kinship. Such a piecemeal approach of law reform may not be an exciting quick fix for all the difficulties same-sex-oriented people are going through. However, it can benefit a wider scope of individuals and relationships. Hopefully, more scholarly work and activism will be carried out to this end.

Overall, this thesis has discussed the constraining, covering and malleable nature of the marriage-parenthood-eldercare straightjacket, the pluralist framework of family law, and the divergent life paths, feelings and legal consciousness of same-sex-oriented people and those closely related to them. It contributes detailed legal analysis and vivid ethnographic stories to the (queer) kinship studies in China and beyond. It pays tribute to all the activists, scholars and ordinary people who take a part in loosing and reshaping the straightjacket.



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## 2 LIST OF NATIONAL OR PROVINCIAL LEGISLATION IN CHINA

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- Ethical Principles on Human Assisted Reproductive Technology and Human Sperm Bank (人类辅助生殖技术和人类精子库伦理原则), issued 27 June 2003, effective 1 October 2003.
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## Summary

### *Straightjacket: Same-Sex Orientation under Chinese Family Law – Marriage, Parenthood, Eldercare*

This PhD thesis gives a panorama of both the official laws and the informal social norms that influence the family life of same-sex-oriented persons in mainland China. It pivots around three important imperatives in the 'normal' trajectory of family life: getting married, giving birth and securing eldercare. It asks how Chinese same-sex-oriented people follow and/or resist this path, and in this process, how they interact with Family Law in its pluralist sense.

This thesis covers a wide range of socio-legal issues that are directly or implicitly influencing one's family life. It discusses de/criminalization (the change of the crime of hooliganism), de/pathologization (conversion therapy and the objection thereof), homosexual representations (such as trademarks and films), same-sex weddings, the distribution of communal property of same-sex cohabitants, custody in divorce cases, official and de facto adoption, fostering, in vitro fertilization conducted by lesbian couples, transnational surrogacy by gay couples, inheritance between same-sex partners, medical decision in emergency, same-sex marriage campaigning, old-age planning, coming out to parents, etc. It also documents how ordinary people, lawyers and activists change the law via legislative proposals, impact litigation and transnational linkage.

Alongside detailed legal analysis, this thesis features vivid story-telling from eight months' anthropological fieldwork. The author conducted semi-structured interviews and informal conversations with more than 60 respondents. The story-tellers include same-sex couples of different generations, cooperatively married lesbians and gay men, 'cheating' husbands and unwitting wives in mixed-orientation marriages, parents of lesbian and gay adult children, friendly lawyers, LGBT activists and so on. Together they show the tensions between the global LGBT rights discourse and the lived experiences of Chinese same-sex-oriented persons with or without a gay identity.

*Straightjacket* offers an epistemology that avoids the binary of closeting and coming out. While acknowledging the uncomfortable restriction of the heteronormative imperatives, this research also recognizes the seductive socio-legal benefits for the 'family outlaws' to follow suit. Accordingly, it questions the encouragement of coming-out and the condemnation of non-disclosure often seen in LGBT movements. It also endorses a beyond-marriage approach of legal reform, which unpacks the rights attached to marriage, so that the law can protect not only same-sex couples but also a wider range of relationships worth valuing.

This research incorporates legal doctrinal research, ethnography, queer theory, gender studies and post-colonial theory. It dialogues with legal consciousness doctrine, namely, ordinary people's actions 'before', 'with' and 'against' the law; it reflects on the research ethics of conducting fieldwork on sensitive topics; it complicates the anti-normative ethos in queer theory; it shows the not always harmonious relation between women's rights and gay rights, especially regarding marriage and reproduction. This study takes seriously both the empowering and the limiting effects of a globally popularizing LGBT rights discourse.

## 内容简介 (Summary in Chinese)

### 《直线夹克：中国家庭法下的性倾向——关于婚姻、生育、养老的法人类学研究》

本学位论文梳理了中国大陆影响同性性倾向人群婚家抉择的法律。此处法律采广义，包括法律法规、政策规章、司法案例，以及不成文的社会规范。文章围绕着“结婚、生子、养老”这一“直线”人生轨迹，探讨法律如何向同性性倾向人群施加压力，又如何提供各种便利吸引其进入异性婚家。本文涵盖大量与同性恋及婚家家庭相关的议题，包括鸡奸除罪化、同性恋去病化、同性婚礼、离婚财产分割、抚养权争议、收养、寄养、人工生殖、代孕、遗产继承、紧急医疗决定、同性婚姻、国际倡导等，作者对其进行了详尽的法教义学和法社会学分析（第二至五章）。本文也记录了律师和活动家如何通过影响力诉讼等手段为同性恋者争取权益（第六章）。

作者经过八个月的田野调查，对六十余位受访者进行了半结构式访谈，同时对线上和线下同志社群活动进行了参与式观察。研究对象包括同性伴侣、有意向或已经进入形式互助婚姻中的男女同性恋者、“骗婚男同”、“同妻”、“同夫”、同性恋亲友会家长、彩虹律师、同性恋权益活动家等。受访者的年龄、性别、社会经济地位、婚恋状态及生活方式呈现出巨大差异，从中我们得以窥见在快速变化的当代中国，婚家家庭领域如何呈现出中西文化和新老代际之张力。

本文英文标题 Straightjacket 有双关意涵，一为紧身衣，一为“直人”扮相（即异性恋的婚家轨迹）。该词的灵感来自一位访谈对象：“婚姻就像遮羞布；既然为父母面子形了婚，干脆生个孩子，把整套衣服穿上得了。”许多受访者都对异性婚姻及其附带的法律利益和社会认可抱此实用主义态度，而非仅仅控诉婚家对同性恋的捆绑。这种对婚家制度爱恨纠缠的矛盾情感，用既束缚又舒服的“夹克/假壳”来描述，比起把出柜/伪装、压迫/反抗、进步/传统对立起来的暗柜认识论，更符合当今中国多元价值冲撞的现实。

此番纠缠和冲撞在“同妻”现象中尤为凸显，作者在第三四章透过深度访谈和庭审参与式观察，对大众话语中的“骗婚”和“骗子宫”进行了更细致的思辨。第五章的农村老年“拉拉”的故事和亲友会家长的讲述，看似与“同妻”无关，却都涉及同一主题，即，同性恋这一标签和全球迅速扩张的同志权益话语对此前并无“同性恋”身份认同的人群的生活和价值观产生了激烈震荡。在结论章，作者重新探讨了隐瞒和坦诚的伦理，以及超越婚姻、超越身份政治的婚家家庭法律变革的可能性。

本研究试图打破学科之间的藩篱，采法教义学、民族志、酷儿理论、性别研究和后殖民理论各家之长，并尽可能以简明易懂的语言让不同学科背景的读者有所共鸣。本文的理论抱负不仅仅是为西方的研究增添一些案例，或者强调中国的特殊性，而是希望参与到普世性的竞逐，而这也是作者未来研究投入的方向。



## Samenvatting (Summary in Dutch)

*Straightjacket: Gelijkgeslachtelijke Gerichtheid onder het Chinese  
Familierecht – Huwelijk, Ouderschap, Zorg voor de Oude Dag*

Dit proefschrift biedt een panorama van zowel officiële wetten als informele normen in China die van invloed zijn op het familielevens van mensen die zich aangetrokken voelen tot hetzelfde geslacht. Het draait om drie belangrijke imperatieven in de 'normale' Chinese familielevensloop: trouwen, kinderen krijgen, en zorgen voor de oude dag. Het stelt de vraag hoe gelijkgeslachtelijk gerichte mensen in China dit pad volgen of weerstaan, en hoe zij daarbij omgaan met de vele lagen van het familierecht.

Het onderzoek bestrijkt een breed scala aan juridische/sociale kwesties, zoals de/criminalisering (de veranderingen in het misdrijf *hooliganism*), de/pathologisering (conversie-therapie en de verwerping daarvan), verbeeldingen van homoseksuele gerichtheid (zoals in handelsmerken en in films), bruiloften van twee vrouwen of twee mannen, de verdeling van gemeenschappelijke bezittingen van samenwoners van hetzelfde geslacht, voogdij bij echtscheiding, officiële en feitelijke adoptie, pleegzorg, *in vitro* fertilisatie bij lesbische stellen, transnationaal draagmoederschap ten behoeve van homostellen, nalatenschap tussen partners van gelijk geslacht, medische beslissingen in noodgevallen, activisme voor het 'homohuwelijk', plannen maken voor de oude dag, uit-de-kast komen bij je ouders, enzovoort. Het proefschrift documenteert bovendien hoe gewone mensen, juristen, en activisten het recht veranderen door middel van proefprocessen, voorstellen voor wetgeving, en transnationaal activisme.

Naast een gedetailleerde juridische analyse, biedt dit proefschrift levendige verhalen gebaseerd op acht maanden antropologisch veldwerk. De auteur heeft semi-gestructureerde interviews en informele gesprekken gevoerd met meer dan 60 respondenten: koppels van hetzelfde geslacht (uit verschillende generaties), coöperatief met elkaar getrouwde lesbiënnes en homomannen, 'bedriegende' en 'niets vermoedende' echtgenoten van verschillende gerichtheid in 'gemengde'-huwelijken, ouders van volwassen homoseksuele kinderen, homovriendelijke juristen, *LGBT* activisten, enzovoort. Bij elkaar laten zij spanningen zien tussen het wereldwijde discours over *LGBT rights* enerzijds, en de geleefde ervaringen van gelijkgeslachtelijk gerichte mensen met of zonder een homo- of lesbische identiteit in China anderzijds.

Onder de titel *Straightjacket* (keurslijf, dwangbuis), biedt dit proefschrift een epistemologie die het binaire concept van in en uit de kast vermijdt. Hoewel het onderzoek de knellende beperking door de hetero-normatieve imperatieven serieus neemt, erkent het tegelijkertijd hoe verleidelijke juridische en maatschappelijke voordelen het hetero-keurslijf aantrekkelijk

maken voor *family outlaws*. Van daaruit stelt het vragen bij het aanmoedigen van uit-de-kast komen en bij het afkeuren van er-niet-mee-voor-de-dag komen, zoals vaak te zien in *LGBT* bewegingen. Wat juridische hervormingen betreft, pleit deze studie voor een benadering 'voorbij' het (homo) huwelijk, een benadering die de rechtsgevolgen van het huwelijk loskoppelt van het gehuwd zijn, zodat niet alleen gelijkgeslachtelijke paren worden beschermd maar ook een ruimer scala aan waardevolle relatievormen.

Dit proefschrift combineert juridisch onderzoek, etnografie, *queer theory*, *gender studies* en postkoloniale theorie. Het gaat in gesprek met de theorie van *legal consciousness* die menselijke handelingen beschrijft in termen van 'voor', 'met' en 'tegen' het recht; het reflecteert op onderzoeksethiek bij veldwerk over gevoelige onderwerpen; het compliceert het anti-normatieve ethos in *queer theory*; het toont de niet altijd harmonieuze relatie tussen vrouwenrechten en homorechten, in het bijzonder waar het gaat om huwelijk en voortplanting. Deze studie toont zich bewust van zowel de versterkende als de beperkende effecten van een wereldwijd populariserend discours over *LGBT rights*.

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1 The framework of Family Law (FL) 1, 2, 3 and 4 is elaborated in Sections 1.2, 7.2 and 7.5. To summarize, FL1 refers to the positive laws on narrowly-defined family-law issues such as marriage, parenthood and inheritance; FL2 covers a wider scope of law that contains certain family-law aspects (such as provisions on spousal co-ownership in property law); FL3 include the positive laws that impact indirectly but structurally on family (such as retirement age); and FL4 refers to other informal norms that shape the normative family life. Note that the variations and interaction in everyday life is more complicated than the prototypes.

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# Curriculum Vitae

Jingshu Zhu did her PhD research at Leiden University in the Netherlands from March 2013 to February 2018. Her PhD thesis combines law and anthropology in examining how Chinese same-sex-oriented people deal with the socio-legal imperatives of getting married, becoming parents and securing eldercare in a normative family. This is the first doctoral thesis written in English on sexual orientation law in contemporary China; it is also the first thesis in this field funded by the China Scholarship Council.

She has published articles about sexual orientation law in English and Chinese in peer-reviewed academic journals. Her Chinese translation of the book *Covering: The Hidden Assault on Our Civil Rights* by Kenji Yoshino was well received. She is one of the two authors of *State-Sponsored Homophobia – A World Survey of Laws: Criminalisation, Protection and Recognition of Same-Sex Love* (2013 and 2014 editions), an influential annual report issued by the International Lesbian Gay Bisexual Trans and Intersex Association (ILGA). She is also a columnist at HelanOnline and LoveMatters, writing essays on hot topics in relation to gender and sexuality in China and the Netherlands.

After her law studies at the Beijing Institute of Technology, Zhu completed an Advanced LL.M. in Public International Law at Leiden Law School, where she worked as a research assistant for Professor Kees Waaldijk. Together they developed a dynamic visualization tool that shows the correlation between laws and attitudes regarding homosexuality in more than 90 countries, which has been presented at several international conferences from 2012 onwards. She has given guest lectures on sexual orientation law in contemporary China, at Leiden University and at the National Central University in Taiwan. She has also presented her work in academic conferences worldwide, including Stockholm, Bangkok, Geneva, Lisbon, Taipei, Beijing, Luxembourg, Amsterdam, Zalesie, and Mexico City. She was also an invited keynote speaker at the second Non-Monogamous and Contemporary Intimacies Conference in Vienna in 2017.

Beyond her academic interests, Zhu is actively involved in Chinese LGBT movements by providing legal consultation for local NGOs and participating in advocatory events. She has been hosting a popular sex-positive podcast since 2015, telling gender and sexuality stories with a critical mind.



In de boekenreeks van het E.M. Meijers Instituut van de Faculteit der Rechtsgeleerdheid, Universiteit Leiden, zijn in 2016 en 2017 verschenen:

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