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

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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法规的变迁)' (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

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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

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

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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 delegating 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.

