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

Zhu, J.

Citation

Zhu, J. (2018, February 21). *Straightjacket : same-sex orientation under Chinese family law - Marriage, Parenthood, Eldercare*. Meijers-reeks. Retrieved from <https://hdl.handle.net/1887/61002>

Version: Not Applicable (or Unknown)

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Note: To cite this publication please use the final published version (if applicable).

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Author: Zhu, J.

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Issue Date: 2018-02-21

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'.¹ 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.² 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'.³ 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.⁴ 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

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 4⁵ 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'⁶;
- 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'⁷ in concrete cases.

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,⁸ so is the discussion on same-sex-oriented people's pressure to marry.⁹ 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;¹⁰ when changing from single ownership of a real estate into co-ownership, spouses are exempted from the burdensome deed tax;¹¹ and upon dissolution, statutory rules on alimony would apply to guarantee the rights of the child and the economically weaker party.¹²

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.¹³ According to the relevant law and administrative regulation, only 'relatives or guardians' can visit the detainees.¹⁴ 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 Manman¹⁵ 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 hetero-normative marriage law and prison visitation law.¹⁶

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.¹⁷ 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.

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,¹⁸ 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.¹⁹ In this 'gift-giving'²⁰ 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.'²¹

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. Hodge*, 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'.²²

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,²³ 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'²⁴ is the only criterion to grant a divorce in case of disagreement between spouses,²⁵ 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'²⁶ 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.²⁷ 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'.²⁸

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,

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'.²⁹

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.³⁰ 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.³¹

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.³² The Supreme Court refrained from giving a definite answer with regard to the validity of loyalty agreements,³³ while local courts' opinions diverge.³⁴ 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) 西城民初字第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一审民事判决书, 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.³⁵

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.³⁶ However, the 2011 Interpretation of the Marriage Law³⁷ 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.³⁸

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 Yourself 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...³⁹

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.⁴⁰ 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.⁴¹

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.⁴² 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,⁴³ 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/60c94rCac.

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.

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 chips⁴⁴ 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.

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.⁴⁵ 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-

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'.⁴⁶ While same-sex weddings can be criticized as imitating heterosexual ones,⁴⁷ 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.⁴⁸ In another wedding between a lesbian activist couple Taozi and Yingzi⁴⁹, 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.⁵⁰ 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 Yushi⁵¹, 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 m². 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.

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.

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

action center thus can be said to have 'functional equivalence'⁵² 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.⁵³ 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

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.⁵⁴ 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.

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.⁵⁵ 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.⁵⁶ 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'⁵⁷: 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

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.⁵⁸ 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.'⁵⁹

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.⁶⁰ 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.⁶¹ 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’.⁶² 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’.⁶³ However, same-sex couples are not entitled to such ‘reimbursement alimony’,⁶⁴ 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.⁶⁵

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'.⁶⁶

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.'⁶⁷

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.⁶⁸

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.

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.

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.⁶⁹ 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',⁷⁰ 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.⁷¹

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

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.⁷² 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').⁷³

'Marriage fraud' is a highly gendered phenomenon – while media have increasingly covered *tongqis'* stories, there is little discussion of *tongfus*.⁷⁴ 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.⁷⁵ 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'⁷⁶ or 'Still a Virgin in Her 60s'⁷⁷. 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.

77 Juan Fang, '600 Thousands *Tongqis* among Tens of Millions Are Still Virgins', *Souhu Women*, 15 February 2012, at 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'⁷⁸, a 'new intimate alliance'⁷⁹ or a 'queer kinship practice'⁸⁰ 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.⁸¹ 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.⁸² Instead of hiding oneself in marriage, some argue, coming out is the most authentic and burden-free lifestyle.⁸³ According to the popular gay-rights slogans of 'being your true self' and 'becoming powerful inside',⁸⁴ a different-sex marriage, whether cooperative or mixed-orientation, is deemed substantially incompatible with a true same-sex-desiring self.⁸⁵

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

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.

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.

83 Ibid.

84 In my fieldwork, the rhetoric of inner strength (*neixin qiangda*) 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, Xiong⁸⁶, 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.

.....

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'.⁸⁷

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.⁸⁸ 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,

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.'⁸⁹

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,⁹⁰ as well as the statutory duty to maintain each other.⁹¹ 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,⁹² 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.⁹³ 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.

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.⁹⁴ 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.⁹⁵ 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.⁹⁶

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.⁹⁷

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'.⁹⁸ 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.⁹⁹ These stories, whether authentic or not, do reveal genuinely-felt fears and anxieties. Chinese law does not make clear the

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.

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.

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.

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. Although the authenticity of the story is questionable, the fear of lesbians is embodied and worth addressing.

liabilities of marital rape,¹⁰⁰ and the recently promulgated Law Against Domestic Violence does not include sexual violence within a family.¹⁰¹ 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,¹⁰² 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'¹⁰³ 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.¹⁰⁴ 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.¹⁰⁵ 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 Yuan¹⁰⁶, 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-

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 group¹⁰⁷ 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,¹⁰⁸ but also pertinent in the activists’ political struggles. This is another example of how people’s practices enrich the meanings of marriage.

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’,¹⁰⁹ trying to find out the underrepresented: the mixed-orientation marriages that do work.¹¹⁰ 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.¹¹¹ 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 quitted 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.¹¹² There, although few bloggers openly discuss extra-marital relationships, most of them do condemn harshly on their 'lesbian'¹¹³ 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.¹¹⁴ 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.

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'¹¹⁵. 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. Rou¹¹⁶, 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."' ¹¹⁷

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' ¹¹⁸. 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). ¹¹⁹ 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

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.¹²⁰

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,¹²¹ or to secure double compensation for house demolition and resettlement;¹²² some ‘fake’ a marriage and then divorce to get the residence permit in a preferable place,¹²³ or to get a ‘birth permit’ for an unborn child.¹²⁴ 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.

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.

124 *Zhang v. Ge*, Xiangyin Court, Hunan, 2014, No. 810 (张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) 湘民一初字第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,¹²⁵ although if one party changed his or her mind, the court may not support the other's request for divorce.¹²⁶

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

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.¹²⁷ 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.¹²⁸ 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.¹²⁹ 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,

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. 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'¹³⁰ 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.

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. Disappointedly and angrily, she complaint, '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.'¹³¹ 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'¹³². 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.¹³³ 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.¹³⁴ 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...'

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,¹³⁵ 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;¹³⁶ women usually shoulder more expectation

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;¹³⁷ the shrinking of social welfare have made it more difficult for women to live alone;¹³⁸ and the state's propaganda that shifts eldercare responsibility to core families also gives moral and economic pressure on women with non-normative lifestyles.¹³⁹ 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.¹⁴⁰ Another example of FL2 is prison visitation, where only 'relatives' are allowed.¹⁴¹ 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.¹⁴² FL4 are also ubiquitous in this chapter: the gendered division of labor in marriage (men as breadwinner and women caretaker);¹⁴³ financial ability as men's entrance ticket to the dating pool;¹⁴⁴ the expected manners of a daughter-in-law towards the elders;¹⁴⁵ the folks' proverbs on marriage and divorce,¹⁴⁶ 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.¹⁴⁷ 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

147 See footnote 104 and accompanying text.

appeared in 'ordinary' marriages in China as well,¹⁴⁸ with the democratization of intimate relationships in both Western and Chinese societies.¹⁴⁹ 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.¹⁵⁰ 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*,¹⁵¹ a *tongqi*,¹⁵² and a bisexual woman,¹⁵³ 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.

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.¹⁵⁴ 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.¹⁵⁵ 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.

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

155 See Section 3.2.2.