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

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

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

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

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

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

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

#### 4.1 THE PRESSURE TO HAVE CHILDREN

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

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

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

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

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

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

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

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

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

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

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

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

10 See for instance, an anonymous post on the Internet: 'How Could Closeted Homosexuals Persuade Their Parents to Have A Second Child? (未出柜同性恋应如何劝父母生二胎?)', *Zhihu*, at [www.webcitation.org/6l0cfl2J0](http://www.webcitation.org/6l0cfl2J0).

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

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

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

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

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

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

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

15 See above, footnote 13, Article 23.

16 Ibid, Article 26.

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

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

#### 4.2 CHINESE LAWS ON PARENTHOOD

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

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

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

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

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

### 4.2.1 Birth Permit

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

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

### 4.2.2 Parental Status

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

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21 See Section 4.1.

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

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

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

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



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

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

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

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

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

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

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

30 Ibid.

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

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

### 4.2.3 Guardianship

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

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

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

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

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

### 4.2.4 Adoption

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

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

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

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

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

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

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

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

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38 Adoption Law, Article 22 (2).

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

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

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

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

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

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

45 Interview on 16 August 2014.

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

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

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

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

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

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

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

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

50 Interview with Ah-Qiang, 26 September 2014.

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

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

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

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

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

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

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

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

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

57 Ibid.

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

### 4.2.5 Fostering

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

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

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

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

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

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

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

#### 4.2.6 Assisted Reproductive Technology

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

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

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

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

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

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

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

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

68 Ibid.

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

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

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



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

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

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

#### 4.2.7 Summary

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

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

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

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

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



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

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

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

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

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

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

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76 See above, footnote 67.

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

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

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

There are very few 'LaMas' (lesbian mothers) who have come out with their parenting experiences, but as the number of lesbian intended parents increases, LaMa communities have begun to form. As a researcher, I joined a WeChat group called 'Be LaMa, Be Papa', where LaMas share their experiences and answer questions raised by new comers. Many of them have become self-taught experts on the medical, legal and financial issues concerning IUI, IVF-ET, and gestational surrogacy.

I talked to a then 33-year-old lesbian called Green, among several other group members, who illustrated the importance of social connections in circumventing a hostile legal environment. Green and her partner White came out to their parents five years previously. When they were financially and mentally ready to become parents, all four parents keenly supported them. By the time I interviewed Green, White was already pregnant, using Green's ova and a 'half-anonymous' donor's sperm. By 'half-anonymous' sperm donor, Green meant that they found a middle ground between known and unknown donation:

'I have a straight male friend, C, who made friends with an open-minded doctor. That was how we connected to the doctor who agreed to do the surgery for us. The donor is also a friend of C's. We all came to consensus that we should not meet up, so as to prevent unnecessary disputes. We don't even know each other's phone number. We did not have any legal agreements, since White and I would never cast greedy eyes on the donor's property. In the whole process, we communicated through C as a middleman.'

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78 The impact of the lack of institutional recognition and support on the failure of same-sex relationships to endure has been discussed in Ellen DB Riggie, Sharon S Rostosky and Robert A Prather, 'Advance Planning by Same-Sex Couples.' (2006) 27 *Journal of Family Issues* 6, 758-776; Kristin P Beals, Emily A Impett and Letitia Anne Peplau, 'Lesbians in Love: Why Some Relationships Endure and Others End' (2002) 6 *Journal of Lesbian Studies* 1, 53-63. There is no qualitative or quantitative research on the reasons for same-sex separation in China yet.

To my surprise, unlike most other Chinese lesbian couples who went through the procedures abroad, they successfully underwent IVF and gestational surrogacy in a Chinese hospital. Describing their experiences Green kept parodying a Communist Party propaganda phrase:

‘This is what I call “Chinese characteristics” of lesbian parenting: in this bizarre (*qipa*) country, it appears that you can do nothing, but in fact you can do anything! The law is not sophisticated, so in many areas, the local policies, the personal connection, and “the doctrine of golden mean” all play important roles.

...We started to play with the “Chinese characteristics” since we decided to start a family. The doctor knew that we were lesbians and was willing to help. Of course, our gifts and “red envelopes” (gift money) are also crucial in maintaining good doctor-patient relationship. That’s why he did not ask us to provide marriage certificate or any other permits.’

The IVF procedures were also conducted at the periphery of breaking the state law:

‘On the day of the procedure, the sperm donor produced semen in a hotel nearby, and C brought the container to the hospital, without letting us meet one another. Actually a lot of sperm collection in China is done in this way, because it is illegal for unauthorized hospitals to have a sperm bank.

In addition to the doctor I just mentioned, other relevant people were also “taken good care of” (*dadian haole*). We didn’t come out [to them], and they simply treated me as an “infertile patient” and my partner as an altruistic friend for gestational surrogacy. My “husband” did not show up because we said, “he happened to be busy with his work that day”.’

It is very likely that all the doctors and nurses knew that doing IVF for an unmarried woman, using sperm other than from an official sperm bank, and transferring the embryo to another unmarried woman’s uterus are illegal in China, but as Green kept emphasizing, ‘the Chinese characteristics just worked.’

What Green refers to as ‘Chinese characteristics’ are noteworthy. For her, the most powerful tool that can counterbalance her disadvantages as an unmarried woman is probably *guanxi*, or social connection. *Guanxi* is better understood not as a polar opposite to or substitute for China’s formal rules and institutions; rather, they are complementary.<sup>79</sup> If the compliance with the law depends on the extent to which the law responds to social needs,<sup>80</sup> then people’s resorting to *guanxi* and avoiding the law in certain contexts is a sign of the law’s failure to address their legitimate needs. Green’s case is an apt example of this correlation: as the law on IVF-ET excludes the unmarried, this lesbian couple and the doctors had to covertly break the law. The *guanxi* between them played an important role in such collabora-

79 Pitman B Potter, ‘Guanxi and the PRC Legal System: From Contradiction to Complementarity’ in Thomas Gold, Doug Guthrie and David Wank (eds), *Social Connections in China: Institutions, Culture, and the Changing Nature of Guanxi* (Cambridge University Press 2002) 179-196.

80 Ibid.

tive non-compliance, which is built partly on, but not limited to, gift-giving, compassion, mutual trust and antipathy towards discriminatory laws. For Green and White, such bond is an indispensable asset, an extra-legal resource that justifies and prompts their goal of child-bearing, despite the illegal nature of their actions from a strictly legal perspective.

Green emphasized that her case was very special and should not be taken as representing other lesbians. Indeed, their ability to pay red-envelope money suggests that they're more economically privileged than many same-sex couples, more so even than some heterosexual married couples who enjoy more legal privileges but who are economically precarious. Moreover, the hospital and doctors that helped them may not dare to break the law all the time, so there was an element of luck as well.

The contingency aside, however, the phenomenon of surfing the grey areas is not exceptional. In fact, the tactic of using social connections to wriggle free from the legal straightjacket of parenthood is not an essentially 'Chinese' one. If we see law as 'a technical instrument used to pursue advantages – one used most effectively by those with other resources',<sup>81</sup> then it is unsurprising that various against-the-law practices can be found within the experience of same-sex (intended) parents in other cultures as well. For instance, lesbian and gay parents in the legally-less-friendly jurisdictions in the United States also find their social networks particularly important; tacit transgression of the law is also seen there.<sup>82</sup> Comparing experiences from different countries alongside one another can help us challenge the false dichotomy of European and American rule-of-law versus China's lack thereof. This point will be revisited in Chapter 7.

#### 4.3.2 Becoming Gay Fathers via Surrogacy

For financially-able gay Chinese men, transnational surrogacy is an increasingly realistic route to parenthood. Until a few years ago, the only well-known gay family with children via surrogacy was that of a well-off gay couple, Li and Ruan.<sup>83</sup> They moved to the United States and became the epitome of the 'American dream': Each of them has secured tenure in a medical school, and each has had twins via surrogacy.<sup>84</sup>

Li and Ruan are often lauded as role models for Chinese gay men. However, as I observed in the 2014 PFLAG annual meeting, some less wealthy gay people and their parents have expressed an even greater sense of pessimism after hearing their stories, because for them such a route would

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81 Marc Galanter, 'Law Abounding: Legalisation around the North Atlantic' (1992) 55 *The Modern Law Review* 1, 1-24, 23.

82 Amanda K Baumle and D'Lane R Compton, *Legalizing LGBT Families: How the Law Shapes Parenthood* (New York University Press, New York and London, 2015) 190.

83 Their names are used as they appear in media.

84 Li and Ruan's life stories can be found on their Sina Weibo account 'Family of Li and Ruan' (李阮一家人), at [www.webcitation.org/6qwXavrX3](http://www.webcitation.org/6qwXavrX3).

be fantastical.<sup>85</sup> Indeed, Li and Ruan's 'success' was highly dependent on their educational background, English-language skills, financial privilege and global mobility, which might be a mission impossible for the average working-class gay man in mainland China. Moreover, according to the law in Maryland where they legally reside, gay couples can enter into domestic partnership or same-sex marriage, and surrogacy is formally recognized after going through a 'pre-birth order' process.<sup>86</sup> That means they also enjoy many more legal advantages than gay couples in China do.

Like the LaMa forums, there are also now a number of small online and offline groups for gay dads and intending ones. After attending one of Li and Ruan's story-sharing events, Wang Yu and Zhao Jun, the gay couple mentioned earlier in Section 4.1, decided to have children via surrogacy as well. They did thorough research online into the laws, technologies and costs of surrogacy in different countries, while also consulting Li and Ruan, family and immigration lawyers, as well as transnational surrogacy agencies. They finally chose Thailand, where commercial surrogacy for foreign intended gay parents was then lawful.<sup>87</sup> The price of the whole process in Thailand was less than one quarter of that in the US, which is nonetheless still unthinkable for Chinese working class.

Although they managed to have Zhao's surrogate biological child legally in Thailand, the law still created unexpected problems. Two of their main concerns were whether the baby girl could pass Immigration Checks and be safely brought back to China, and whether she could secure a household registration certificate (*hukou*) in China as she was born out of wedlock abroad. In the end, the two dads managed to take their daughter home, but to date she is not registered as a lawful resident yet, which may incur more inconvenience concerning health insurance and education in the future.

Notwithstanding the formal legal barriers, by dealing with authorities of all sorts, Wang and Zhao have acquired detailed knowledge about the pragmatic solutions of intercountry surrogacy, immigration, residence registration and forum-shopping. For instance, they now know that some airports have relatively more gay-friendly immigration-check personnel; they also know of some small hospitals in the suburban areas that are not strict about requiring a birth certificate and a *hukou* of the baby, so that they can go to these places should their child get sick.

The parents of Zhao Jun expressed a degree of unhappiness that surrogacy policies in China and Thailand make it much more difficult and expensive for their gay son to have a biological child. However, their wish

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85 Participant observation on 13 September 2014.

86 *In Re: Roberto D.B.* No. 110, Sept. Term, Court of Appeals of Maryland, United States (2007).

87 During the surrogate mother's pregnancy in late 2014, Thailand was just about to pass a law banning foreign same-sex couples taking surrogate children out of this country, after a Western Australian couple were accused of leaving a twin boy with his surrogate mother after they discovered he had Down syndrome. For more information about the law banning commercial surrogacy in 2014, see 'Thailand bans commercial surrogacy', *the Guardian*, 20 February 2015, at [www.webcitation.org/6YoMF4xY7](http://www.webcitation.org/6YoMF4xY7).

for the child to be legitimate and safe far outweighs their grudges against the law. As Zhao's mother told me, she would be more than willing to give red envelopes to officials whenever necessary, as long as it was for the good of her granddaughter.

Many gay couples seeking surrogacy share a similar mindset. They are less interested in making an outright challenge to the ban on surrogacy, than in finding the most feasible way to become parents soon, legally, or even illegally. Just like Baumle and Compton observed in their research on the legal consciousness of same-sex-oriented people in legally hostile states in the U.S., my gay respondents' feelings of injustice and the resentment they expressed to the current laws are often 'tempered by the desire to achieve their family goals'.<sup>88</sup> They are less ambitious for gay rights advocacy, because they are worried about the negative effects that a backlash might have on the peaceful upbringing of their children.<sup>89</sup>

Of course, these Chinese gay men's efforts to become parents before, with or against the law are only one of the numerous and interlinked facets of transnational surrogacy. Some feminists warn that new reproductive technologies do not automatically improve the status of women, and that biogenetic capitalism may even reinforce and intensify the existing patterns of discrimination and exploitation.<sup>90</sup> Unfortunately, I was not able to talk to the white ovum donor<sup>91</sup> or the surrogate mother of Zhao's child, nor could I see the extent to which Chinese gay men's pursuit of rights is (un)attentive to women's reproductive justice. Further research is needed in this regard.

#### 4.3.3 Guoji: Informal Intra-Family Adoption

Not every same-sex couple can afford transnational, high-technology surrogacy. Theoretically, it is possible for a same-sex-oriented person to adopt as an unmarried individual.<sup>92</sup> However, except for stories I heard in bars or parks that fall under the heading of urban legends, I have not come across any same-sex individuals who live with a formally adopted child, and there is no such demographic data, either. The words of one respondent, Haotian, who tried to have his own child in a cooperative marriage, may explain

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88 Baumle and Compton, *Legalizing LGBT Families* (2015) 18.

89 Ibid.

90 See e.g., Rosi Braidotti, *Nomadic Subjects: Embodiment and Sexual Difference in Contemporary Feminist Theory* (Columbia University Press, New York, 1994) 97. For a radical feminist stance against assisted reproduction, see Gena Corea, *The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Wombs* (Harper and Row, New York, 1986).

91 They chose a good-looking white woman as the ovum donor, because they, like many Chinese gay and lesbian intended parents, want to have a mixed-blood child via ART. In these cases, most donors are white. For the racial concerns in transnational surrogacy, see Fariyal Ross-Sheriff, 'Transnational Cross-Racial Surrogacy: Issues and Concerns' (2012) 27 *Affilia: Journal of Women and Social Work* 125-128.

92 See above, footnotes 36-40 and accompanying text.

some people's reluctance to adopt. He said he was afraid that adopting a child might lead to rumors that he was infertile and impotent. He also firmly believed that an adopted child would not be '*qin* enough'. *Qin* in Chinese, much like 'kin' in English, has a double meaning – emotional attachment and genetic bond, which infers an interlinking of the psychological and the biological in a normative parent-child relationship.<sup>93</sup> The blood relation is one of the reasons why *guoji*, or *de facto* adoption within an extended family,<sup>94</sup> used to be commonplace in China.

An instance of a *guoji* story involving a gay couple has been told publicly. It was on a famous talk show, '*Lu Yu You Yue* (A Date with Lu Yu)'.<sup>95</sup> Both in their fifties, Lunzuo Li and his partner Jiazheng Ju<sup>96</sup> had been living together for 21 years when the interview was conducted in 2006 and, at that point, their son was 28 years old. Back in 1990, when the boy was 12, his biological father, Li's cousin, sent him to the couples' home at the suggestion of Li's father. From then on, the boy lived as the son of this gay couple, whom he calls '*baba* (father)' (his biologically-related uncle Li) and '*shushu* (uncle)' (Li's partner, Ju) respectively.

There are female same-sex cohabitants practicing *guoji*, too. Born in the 1940s and meeting in their twenties, my respondents Lao Feng and Lao Yang<sup>97</sup> have lived together ever since. Neither of them was ever married to a man and, influenced by the propaganda of the Maoist era, they were proud to work on their own farm and to be 'self-reliant' (*zi li geng sheng*). Yang earned the most among her siblings, so her family all counted on her, and never blamed her for not getting married. After all, in rural China, a woman's marrying into (and becoming part of) a new family often means a loss of labor for her biological one.<sup>98</sup> When Yang reached the age of thirty-five, rather than pressure Yang to marry and give birth, her mother called a family meeting, proposing the idea that her three sons discuss it amongst themselves and choose one of their children for Yang to adopt. Not only was there no feeling of ill will, her brothers actually competed to *guoji* to her a son of theirs, because they wanted the child to live in a relatively better-off household.

93 Research has found that in general, adoption in China is not desirable due to the blood-related tradition and the preference for a healthy child. Tsorng-yeh Lee and Treu-yen Chu, 'The Chinese Experience of Male Infertility' (2001) 23 *Western Journal of Nursing Research* 714-725, 722.

94 See above, footnotes 56-58 and accompanying text.

95 See Lu Yu You Yue, 'A Same-Sex Couple of 21 Years', *Youtube*, at [www.webcitation.org/6r6oZwzQH](http://www.webcitation.org/6r6oZwzQH).

96 Their names are well known as such.

97 *Lao* means old in Chinese, and people only call very good friend in the same generation as *lao* plus their last names. Out of respect, young people usually do not call an old person *lao*, but I did so after we became close. More of their stories will be told in Section 5.3.1.

98 Philip CC Huang, 'The Modern Chinese Family: In Light of Economic and Legal History' (2011) 37 *Modern China* 5, 459-497, 486.



Nonetheless, Yang preferred to adopt a girl, partly because she believed that a girl would be easier to raise: ‘unlike a boy, a girl doesn’t need me to build her a house when she gets married’. Research has shown that, despite the general preference for male children in Chinese families, many people choose to adopt a girl because the costs of education and marriage are likely to be much lower than with a boy.<sup>99</sup> There is another benefit Yang did not mention but is now evident in her later years: a daughter is more likely to be considerate and provide emotional and practical care for her parents.<sup>100</sup>

Yang decided to adopt the five-year-old girl, Autumn, who is the daughter of her second younger brother’s. She told me that they went through the paperwork at the civil affairs office of the town, agreeing in writing that Yang should be fully in charge of the girl’s living expenses, education and marriage, while the birth parents should relinquish all legal rights and responsibilities. There was no statutory Adoption Law when they practiced *guoji* in the 1970s, and Lao Yang could not find the paper they signed, so I was unable to know which law they relied on, and what specific terms and conditions the agreement provided.

Living with them since then, Autumn called both Yang and Feng ‘aunty’, although one day she said to me over the Internet, ‘Thank you for treating my *two moms* so nicely’. With slim income, Autumn and her husband live thriftily to provide for their core family – they have a son in high school then. She also supports both her adoptive mothers and her birth parents out of gratefulness and filial piety, even though she is not legally responsible for taking care of the latter. Here the feature of *guoji* becomes distinct: it is a cultural practice, a doing of kinship that strengthens rather than severs the ties in the extended family.

However, the validity of *guoji* as intra-familial *de facto* adoption is now in question. One could argue that because the entire 1984 judicial interpretation is still valid today, and in the absence of any of its findings being explicitly annulled, the provision about *guoji* should still be in effect. However, it is also arguable that since the Adoption Law entered into force in 1992, the formal requirement to register an adoption has automatically invalidated the informal practice of *guoji*.<sup>101</sup> There are already places that take a strictly formalistic approach to law and that consequently do not recognize any *guoji* relationship established after 1992.<sup>102</sup> Other provinces have not yet issued any clear prohibition.

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99 Weiguo Zhang, ‘Who Adopts Girls and Why? Domestic Adoption of Female Children in Contemporary Rural China’ (2006) 56 *The China Journal* 63, 74–82.

100 Ibid, 75.

101 Article 15 requires that any adoption should be registered with the civil affairs department, which implicitly denied the legality of unregistered adoption.

102 See e.g. Opinions on Awarding the Families that Have Made Contributions to Family Planning in Fujian Province (福建省农村部分计划生育家庭贡献奖励制度实施意见), issued by Fujian Family Planning Commission and Bureau of Finance on 2007 February 12, effective 2007 February 12.



Therefore, same-sex individuals and couples who became parents via *guoji* have to deal with legal uncertainties. In the talk show mentioned earlier, we were not told whether Lunzuo Li, as a legally unmarried man, had gone through the procedures to formally adopt the boy. Even if he had not, such *guoji* parent-child relationship, once proved substantial rather than merely ritual, is still likely to be recognized by a court as having the same legal effects as formal adoption, since it happened before 1992. However, the other dad, Jiazheng Ju, is, from a legal standing, a stranger to Li's adoptive son. He and his 'son' may not make medical decisions for one another, nor be one another's statutory successor. Nor does Ju have any parental authority over or responsibility for him. The same goes to Lao Feng, the non-*guoji* mother of Autumn.

#### 4.3.4 Summary

In the shadow of the laws on parenthood that predominantly favor different-sex married couples, same-sex-oriented people have explored at least three routes to becoming parents in the absence of a marriage certificate. Sometimes they obey or use the law for practical reasons, such as when they try to obtain a legal *hukou* for a child because it facilitates going to school or hospital. At times, they would rather surf the legally grey areas and even carefully break the law, as shown in the cases of transnational surrogacy and undergoing IVF-ET as unmarried individuals in a Chinese hospital. Their experiences suggest that in spite of the formal, heteronormative legal system, people can find ways to survive in the periphery. Of course, such agency goes hand in hand with legal risks, financial costs and additional management of interpersonal relationships that could have been avoided were parenthood not bundled so tightly with different-sex marriage.

The high financial, intellectual, social and legal investments of becoming a parent outside marriage partly explains why many same-sex-oriented people are pushed and/or seduced into first getting married and then having children, the 'natural' path for most heterosexuals. Some same-sex-oriented people opt for becoming parents in a mixed-orientation marriage, and some in a gay-and-lesbian cooperative one. The former seems to be far more controversial. Moreover, wives in marriages of all sorts in China tend to feel that their role in child-bearing and rearing is undervalued. When an undervalued wife discovers the secret same-sex desires of the husband, it becomes a recipe for complaints, conflicts and, as we shall see, strongly expressed homophobia from society at large.

#### 4.4 BECOMING PARENTS IN A MIXED-ORIENTATION MARRIAGE

There can be a variety of reasons why many same-sex-oriented people get married and have children with an unwitting person of the different sex: some of them are hoping to 'cure' their homosexuality by using marriage

and parenthood as a form of ‘conversion therapy’; some are trying to make life easier by presenting themselves as a heterosexual *and* a parent – the latter often implies the former by default; some may have realized their same-sex attraction only after marriage; and some others are sexually more fluid yet do want to settle down in marriage and rear their offspring. However, when a same-sex-oriented man (whether gay, bisexual or without clear sexual identity) chooses to have children by marrying a (presumably straight<sup>103</sup>) woman without telling her about his sexual orientation, his behavior is categorically condemned as ‘womb fraud’ (*pian zigong*), which compounds his earlier ‘fault’ of ‘marital fraud’ (*pian hun*).

This section explains how the discourses and feelings around the pseudo-legal<sup>104</sup> term ‘womb fraud’ are constructed, and what realities have been produced out of the very problematizing and condemning of ‘fraud’. Before taking a closer look at how *tongqis* tell their stories of being ‘defrauded of their wombs’, we should examine whether same-sex-oriented people in mainland China enjoy legal rights to have children within a different-sex marriage, and more specifically, whether the courts would deny a same-sex-oriented person custody in a divorce lawsuit on the ground of his or her sexual orientation.

#### 4.4.1 Custody Decisions in Mixed-Orientation Divorces

The Marriage Law does not prohibit people of any sexual orientation from getting married or having children, nor does it oblige people to reveal their orientation beforehand.<sup>105</sup> In terms of the custody after divorce, it only gives vague instructions as to who the child should live with in case of disagreement: ‘the people’s court shall make a judgment in accordance with the rights and interests of the child and the actual conditions of both parents’.<sup>106</sup> There is no law explicitly prohibiting same-sex-oriented people from being a custodial parent, but nor are there non-discrimination rules stipulating that sexual orientation alone should not be a ground for depriving one of custody. That leaves the courts a wide margin of discretion in custody disputes, the results of which often depend on the unspoken sympathies or prejudices about same-sex-oriented people as parents of the particular judges.

In a divorce case in 2014, a trial court in Hangzhou, Zhejiang Province explicitly found that the plaintiff’s claim that the homosexual orientation of the defendant was detrimental to the physical and mental health of the

103 A self-claimed *tongqi* is simply presumed straight in public. Such presumption is also seen in PFLAG parents, as discussed in Section 1.3.3.

104 ‘Fraud’ in Chinese contract law and criminal law only refers to gaining another person’s property by intentional deception. One’s property gain needs to result from the other’s loss of possession and/or ownership, so it does not apply to the decisions made in intimate relationships to ‘give’ one’s love, sex, and reproductive body to another based on false information. Hence ‘womb fraud’ is not a meaningful term in Chinese law.

105 See Chapters 2 and 3.

106 Marriage Law, Article 36 (3).

child lacked evidence, so the court could not support it.<sup>107</sup> A trial court in Shijiazhuang, Hebei Province, however, reached the opposite decision in 2013. It reasoned,

‘the homosexual acts of the defendant violate existing *normal mainstream values and traditional ethics*. Such acts will impose a detrimental influence on the child’s healthy development.’<sup>108</sup>

Therefore, the court upheld the presumably straight spouse’s claim for custody.<sup>109</sup> Note that in international law, arguments for the ‘traditional’ or ‘normal’ family have been rejected in some cases concerning same-sex parenting,<sup>110</sup> but it has not been challenged or substantially debated in Chinese courts, at least not from what we find in existing, sparsely-worded judgments.

In another case, the court did not explicitly discuss the possible influence of the husband’s homosexuality on the child in its merits, but vaguely stated, ‘considering the actual conditions of both parties and the healthy development of the child, it is appropriate to grant the custody to the applicant (the wife)’.<sup>111</sup> Ambiguous judgments like this can hardly be proved discriminatory. In several other cases, the party who was said to be a homosexual denied it, so the courts either found the evidence of the other party insufficient,<sup>112</sup> or found the alleged homosexuality an irrelevant factor.<sup>113</sup>

We cannot know whether the ‘homosexual’ parties have tried to argue in court that same-sex-oriented parents pose no threat to children’s sexual and gender development, something that is often heard in other jurisdictions.<sup>114</sup> In China, most chose to secure custody by denying the

107 *Zhou v. Wang*, Jiangnan, Hangzhou, 2014, No. 511 (周某与王某离婚纠纷一案民事判决书, 杭州市江干区人民法院(2014) 杭江笕民初字第511号).

108 *Zhao v. Pang*, Gaoxin Trial Court, Shijiazhuang, 2013, No. 00280 (赵某与庞某离婚纠纷一案民事判决书, 石家庄高新技术产业开发区人民法院 (2013) 石高民一初字第00280号).

109 *Ibid.*

110 See e.g., *Atala Riffó and Daughters v Chile*, Application No. 1271-04, IACHR (2012), para. 145.

111 *Wang v. Fang*, Putuo Trial Court, Shanghai, 2013, No. 228 (方某某与王某某离婚纠纷一案一审民事判决书, 上海市普陀区人民法院 (2013) 普民一 (民)初字第228号).

112 See e.g., *Huang v. Xu*, Shaoyang Intermediate Court, 2011, No. 385 (上诉人黄建良与被上诉人许跃花离婚纠纷一案民事判决书, 邵阳市中级人民法院 (2011) 邵中民一终字第385号).

113 See e.g., *Wang v. Su*, Haishu Trial Court, Ningbo, 2012, No. 1966 (王某与苏某甲离婚纠纷一案民事判决书, 宁波市海曙区人民法院 (2012) 甬海民初字第1966号).

114 See e.g., *Atala*, above footnote 110, para. 128. See also a case in South Africa, *J and Another v Director General, Department of Home Affairs and Others* (CCT46/02) (2003). For the queer critiques of such an argument, see Nancy D Polikoff, ‘We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not Dismantle the Legal Structure of Gender in Every Marriage’ (1993) 79 *Virginia Law Review* 1535-1550; Suzanna Danuta Walters, ‘The Kids Are All Right but the Lesbians Aren’t: Queer Kinship in US Culture’ (2012) 15 *Sexualities* 917-933; Clifford Rosky, ‘Same-Sex Marriage Litigation and Children’s Right to Be Queer’ (2016) 22 *GLQ: A Journal of Lesbian and Gay Studies* 541-568. These authors argue that the apologetic immutability argument implied in the rhetoric that ‘gay parents would have no influence on children’s (hetero)sexuality’ is not helpful to destigmatize homosexuality, and even does harm to the visibility and rights of queer children.

accusation of homosexuality, rather than proudly coming out and making non-discrimination arguments. The courts tend to ignore this factor, too, at least not making it explicit in their judgments. As suggested by some courts' legal reasoning, decisions relating to custody of children are made primarily according to the age of the child, the willingness and the financial status of the parents, as well as the parent-child relationship. In these cases, custody disputes between mixed-orientation couples look just like a lawsuit between 'normal' spouses.

#### 4.4.2 Experiencing 'Womb Fraud'

The courts' silence on the parties' sexual orientation tacitly acknowledges that parents do not have to be heterosexuals, which is true according to positive law. However, it is such legalism that makes *tongqis* feel unfairly treated, because courts neglect their contributions to housework and parenting, and most importantly, they believe their hurt feelings as the result of having been 'swindled' are ignored. The disparity and tension amongst old written laws, emerging sexual identities and *tongqis*' felt injustice partly explains why the term 'womb fraud' gains ground.

'Womb fraud' is a term that best illustrates the gendered nature of marriages, including but not limited to mixed-orientation ones. While 'marriage fraud' is occasionally used to describe a lesbian marrying an unsuspecting straight man, 'womb fraud' can only be conducted by a man towards a woman. Lesbian mothers in mixed-orientation marriages are rarely labeled 'frauds', but are often pitied as suffering intersectional oppression both as wives, mothers and a sexual minority. In comparison, numerous articles can be found online, written by *tongqis*, pro-*tongqi* feminists, and pro-*tongqi* gay men that condemn 'womb fraud'. In the following section, I will focus on the story of one of my *tongqi* respondents, so as to make sense of their accusation, and of the reality-making effects of the discourse 'fraud'.

Yanzi is a self-identified 'ex-*tongqi*', namely a divorced woman whose ex-husband was gay. After a lengthy custody lawsuit, she is now raising their twin daughters while running her own business. When recalling her former marriage, she believed that her gay husband Sun Lei had long been planning to 'defraud her of her womb':

'He told me that a friend of his had very cute twin sons via IVF. He smiled and said that we could have babies like this as well. I was persuaded, and this was how I fell into his traps step-by-step. Actually, he had done quite a lot of research on IVF back then, while I knew nothing about it.

During our two-year marriage, especially after I gave birth to our twin daughters, we had sex very few times. The celibacy during IVF treatments was a good excuse for him to avoid having sex with me. Also, having twins via IVF might be part of his preparation for divorce from the very beginning, so that he could have the chance to have the custody of at least one child. He never thought about whether the process was good for my health or for the babies. We spent around 30,000 RMB to undertake IVF. Nine ova were taken out of me at one time, and my health significantly worsened afterwards.'

Yanzi continued angrily:

I heard some gay couples are choosing surrogacy in the U.S., but not many people can afford that. So, I was actually used by my ex-husband as a free surrogate mother. Plus, it was I who paid all the IVF fees!

I often wondered, you gay guys are still men, so how the heck can you say you belong to a vulnerable group? You want to get married and have kids? Just make more money, go abroad, marry your partner and do surrogacy! Why are you harming us innocent women?'

Through Yanzi's heartfelt words, we can catch a glimpse of why many *tongqis* feel they have been 'fooled'. For them, 'womb fraud' implies that they took the painful journey through pregnancy and childbirth under the false belief that their husbands were straight men who sincerely loved them. They believe that they lost their wombs and ova, together with their love and chastity, to an unworthy man who is both a 'trickster' and a closeted 'sexual pervert'.

Their anger is understandable, considering the enormous sacrifices in terms of career and personal life women make by becoming mothers. A woman may reasonably feel more furious when her marriage fails to meet her 'basic' expectation (having a straight husband), let alone the ideal of a romantic, sexually harmonious and reproductive marriage. Such an ideal is also linked to the ideal route towards parenthood: a straight man and a straight woman (instead of one being closeted homosexual) making a baby within marriage (rather than unmarried) out of mutual love (instead of the duty to carry on family blood) through 'natural' intercourse (instead of via ART). In contrast, when a 'gay' man's wish to have children appears not to be the result of sexual attraction to, and romantic love for his wife, but due to pressure to procreate and his need to pass as straight, he is understandably denounced as selfish and misogynous. 'Gay' husbands' perceived inability to truly love a woman also makes *tongqis* believe that a gay father is essentially worse than a straight one, without realizing that unloving marriages aimed at procreation are a widespread phenomenon in China, and elsewhere, rather than one specifically involving Chinese gay men.

In fact, there are other reasons why Yanzi got married to Sun in haste and had children. One is a superstitious custom in her hometown, 'counterbalancing bad luck (*chongxi*)'. Before she met Sun, Yanzi's father was already seriously ill, so she wanted to get married and have children as soon as possible, hoping to make her father healthy again. Besides, she said she was a 'traditional' woman who never thought it important to check whether she was sexually compatible with her betrothed before getting married. She also believed that a good woman's virginity should be reserved for her husband. Like Yanzi, another *tongqi*, Ah-Mei, entered into marriage three months after meeting her husband, 'without even holding hands'.

One should not, however, simply blame *tongqis*' own 'recklessness' in marrying someone without first checking out his sexual preferences, or their own 'conservativeness' of thinking about sex only in terms of reproduction.

The shaming of women's sexual desire outside marriage *and* the excessive importance placed on good sex life in consumerist China are the two sides of the same coin of sexuality/power that traps many *tongqis* in a double-bind. Here the cultural norm, familial expectation and gender factors all played a role in her decisions to marry and have children.

Note that the complaint of 'womb fraud' is almost never made by a woman who has had a child with an indifferent or irresponsible straight husband. It is not uncommon that straight men and women get married 'at the appropriate age' out of familial and societal expectations that they procreate, without having established romantic love or developed harmonious sex; and there is no less effort involved and no fewer grievances that arise from pregnancy, birth-giving and child-rearing in a 'normal' marriage. However, unhappy wives in straight marriages tend not to think of their marriages as exploiting their wombs, probably because women's unpaid reproductive roles are so commonly undervalued that they simply take it for granted and swallow their bitterness. The gender inequality behind such a commonplace phenomenon is difficult to detect and challenge, but when a partner's homosexuality with its concomitant stigmas are exposed, it becomes the primary scapegoat for an unhappy marriage that can actually have complicated origins.

Newly invented phrases though they are, 'marriage fraud' and 'womb fraud' within the context of mixed-orientation marriages in China resonate with Marxist feminist traditions, which have striven to debunk the false consciousness of women whose unpaid labor in marriage and child-rearing are justified in patriarchal societies.<sup>115</sup> In China, a report found that the ratio of hours of unpaid care work between men and women was 0.389 in 2015, meaning that if men worked for 4 hours, women would work for 10, suggesting a high level of gender inequality in the domestic sphere.<sup>116</sup> In this sense, one might detect a kind of radical feminist awakening in that many *tongqis* started to question the 'naturalness' of women's duty of birth-giving and parenting in marriage, realizing that women are entitled to sexual satisfaction, to negotiate the sharing of housework and child-rearing duties, and to ask to be treated with respect.

Nevertheless, it is a pity that *tongqis'* emerging feminist awareness mainly fires against gay men, as a result of homophobic prejudices whereby gay misogyny is essentially seen as worse than other forms of misogyny.<sup>117</sup>

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115 Fredrick Engels, *The Origin of the Family, Private Property and the State* (1884) at [www.webcitation.org/6qWjSR3FF](http://www.webcitation.org/6qWjSR3FF); M Wagner, 'Fish Can't See Water: The Need to Humanize Birth' (2001) 75 *International Journal of Gynecology and Obstetrics* 25-37.

116 Global Institute McKinsey, 'The Power of Parity: How Advancing Women's Equality Can Add \$12 Trillion to Global Growth' (2015) 18.

117 Richard Dyer, *The Culture of Queers* (Routledge, London and New York, 2002) 46-48. For more thorough discussions on gay misogyny, see David M Halperin, *How to Be Gay* (The Belknap Press of Harvard University Press, Cambridge, London, 2012).



Singling out same-sex-oriented men for condemnation leaves unchallenged heteronormative assumptions about marriage, misses the wider social-legal environment that undervalues motherhood in and outside marriage, and unfortunately ends up antagonizing *tongqis* and gay men who are both constrained by the straightjacket of marriage and reproduction.

#### 4.5 BECOMING PARENTS IN COOPERATIVE MARRIAGE

The previous two sections have shown that same-sex-oriented people are bound by the straightjacket of heteronormative parenthood: they have to suffer moral condemnation and possibly negative decisions about custody of their offspring if they have children in a mixed-orientation marriage; however, if they do not submit to marriage, their options regarding parenthood are limited, legally risky and more demanding of socio-economic resources. In that light, becoming parents within cooperative marriages seems to balance well legal benefits and respectability. This section looks into the pros and cons of cooperative parenting, paying particular attention to the intersection between gender, sexuality, socio-economic status, legal residence, etc.

##### 4.5.1 Legal Advantages and Disadvantages

As we heard previously,<sup>118</sup> after donning a ‘fig leaf’ or a ‘social outfit’ by marrying a gay man, Jasmine continued by putting on other parts of the straightjacket: having a child. The legal benefits of becoming parents in a cooperative marriage are obvious. Once having entered into a legal marriage, spouses’ sexual orientation becomes largely irrelevant, and the heteronormative laws that regulate parenthood are no longer a stumbling block. Jasmine recalled:

‘We went through the formalities as an “ordinary” couple would: first, both of us requested a stamp from our employers; then I collected another stamp from the household department of my place of birth; and after some other cumbersome paperwork that I can’t remember clearly, I was finally given the birth permit.

All these procedures require your marriage certificate. It is also a must if you want to have any fertility treatment in a good public hospital. The child’s residence registration is premised on the trio package of the marriage certificate, the birth permit and the birth certificate from the hospital – none is dispensable. The same goes to the claims for health insurance for the child. We were lucky that we are locals in Beijing; otherwise the formalities could have been even more complicated.’

Jasmine’s words illustrate how a real marriage certificate can make a huge difference in dealing with the administrative procedures surrounding reproduction. Similarly, armed with a marriage certificate, they did not find it difficult to have a child via IUI:

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118 See Sections 1.1 and 3.3.1.

'We both had health examination and proved fertile, but we simply told the doctor that we couldn't have babies through intercourse no matter how hard we tried, and there were no diagnosable reasons. These words sufficed. The hospital would actually do IUI or IVF-ET for any couple, as long as you show your marriage certificate and pay. Of course, I guess you can also use some personal connections to do it without a marriage certificate, but for us it was just much easier to go through the standard procedures.'

Besides the expected legal conveniences, having a child also significantly minimized her parents' tendency to interfere and be controlling, since it is widely believed that a Chinese woman only becomes independent from her original family once she gets married and gives birth. Now Jasmine has more space with her same-sex partner Meng after moving out from her parents', although their hard-won space is at the same time shrinking due to their day-to-day baby-sitting responsibilities. Once married, says Jasmine, there can also be generational disagreements between the spouses and their parents about the 'best' way to bring up a baby, though luckily they have avoided such disputes, since all four grandparents are happy to put their trust in their highly educated children.

Although the straightjacket has provided the cooperatively married couple with legal conveniences and social status heterosexual couples enjoy, there is an insoluble problem. The non-birth parents, namely the same-sex partners of the cooperative husband and wife, are left in a legal vacuum in terms of their rights and duties vis-à-vis the child. As parenthood cannot be established via contract or *de facto* custody, they have little room for maneuver within the law. According to Jasmine, the two other parents are taking care of the child without being recognized, either by law or by their social surrounding:

'After giving birth, I've continued to live with my partner Meng instead of my husband. We simply told my parents that she is a good friend of mine. We told them she likes children, and she's single anyway, so she's willing to live with me and offer some help. We don't plan to come out to our folks – otherwise why bother having a cooperative marriage – but I do hope when Meng appears more frequently in front of my parents, they will get used to her existence, and then naturally they all get along without putting the cards on table.

The partner of my husband is actually also devoting a lot of time and energy to babysitting during the day time on weekdays, but as he is totally invisible to our parents, his efforts are unappreciated.'

They did not try to make any written arrangements as to the rights and obligations of Meng and Tao in relation to the baby, either:

'We find parental love and mutual trust among the four of us more important. If the trust were gone, disputes would be unavoidable, and then I guess a contract wouldn't help that much. That's why I keep saying that it's crucial to find a reliable comrade to wear the outfit with you, together.'



Jasmine also told me, similar to Mumu's words above,<sup>119</sup> the invisibility of non-birth parents in law and daily life can also be one of the reasons why some same-sex couples break up after one partner enters into cooperative marriage and has a child. The non-birth partner can feel insignificant and insecure before the legally and culturally more 'authentic' spouse, although ironically the latter is just supposed to be there to cover the 'real' same-sex relationship.

In Jasmine's story, most of the laws she and her husband encountered with are the procedures on childbirth and registering the child's residence. Of course, they are also automatically bound by the provisions on parenthood in the Marriage Law, as well as the Inheritance Law in case one of the members of this core family deceased.<sup>120</sup> They tend to obey and use the law more than they act against it, because most of the time the law is on their side as a legally married couple. However, when it comes to the relationship among the four parents and that between the two *de facto* parents and the child, the laws are inadequate to recognize and protect all of them.

#### 4.5.2 Feminist Awareness in Cooperative Marriage

Giving birth in the context of a cooperative marriage, just as in any marriage, is inevitably a feminist issue. Cooperative marriage might be perceived as more egalitarian, yet research has shown that the reality can be much more complicated.<sup>121</sup> When a lesbian becomes a mother in marriage, she is, like *tongqis* and most straight women, also largely trapped by a web of hetero-familial rules. Hui is a butch woman in her thirties. She had tried to conceive a baby via IUI with her cooperative gay husband, but had a miscarriage. During her pregnancy, her then girlfriend broke up with her, because Hui's mother moved in to take care of her, meaning it was not possible for her to spend enough time to nurture her same-sex relationship. Her worries about her own future intimate life were similar to those of many straight single mothers:

'For lesbians who have children by whatever means, the kid can be an incurable scar on their future life. I mean, at least it's a burden. I'm afraid it's very hard for a lesbian mother to find someone, either woman or man, who loves her and her child alike.'

This being said, Hui was still trying to get pregnant, because it is difficult to swim against the mainstream in a small city:

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119 See above, footnote 78.

120 For the rules on intestacy and legacy, see Section 5.2.3.

121 Yaya Chen, 'Challenges on Traditional Marriage by the Marriages and Families of Lesbians (女同性恋者的婚姻和家庭给传统婚姻制度带来的挑战)' (2009) 29 *Society* 4, 1-23; Wang, 'Cooperative Marriage' (2015); Elisabeth Lund Engebretsen, *Queer Women in Urban China: An Ethnography* (Routledge, New York, 2014).

'I really liked children before, but now I'm hesitant. Even if I were pregnant again someday, I guess I wouldn't feel as happy as I did last time. Now it's more like fulfilling an obligation on a road everyone is traveling.'

While Hui sees the compulsory nature of heterosexual marriage and childrearing, some other lesbian respondents come to realize that it is unfair simply to divide all the expenses in half in a supposedly egalitarian marriage.<sup>122</sup> Without the prevalent ideological assumption that marriage is about being self-sacrificing because of love, lesbians tend to be more aware of the taken-for-granted contributions women make in marriage, and above all, in reproduction. As Fei, a lesbian who is seeking a cooperative marriage, complains in her blog,

'Those gay men who want to have kids with their cooperative lesbian wives are really self-ish! They either treat lesbians as free birth machines plus babysitters, or propose hypocritically that we split the fees of childbearing and rearing. What? You mean you wank-off one time and then live as you wish, while I'm pregnant for ten months, suffering the pain of birth giving, and sacrificing my career? You call that 'going Dutch'?

Sure, how about going Dutch this way: you provide the sperms, I offer the ova, we find a surrogate mother, and let's split the fees of surrogacy. It is then that the gay men let the cat out of the bag (*louxian*). They would say, "I'd rather just pay 100,000 RMB for a surrogate mother; why bother having a cooperative marriage like this?"

Ha, 100,000? Let me do the math for you. 280 day's pregnancy, plus preparing for 3 months before and recovering for 3 months, that's 11040 hours in total. 100000 divided by 11040 is about 9.05. You mean a lesbian wife's labor is only worth 9 Yuan per hour?<sup>123</sup> We provide our ova, risk our lives and sacrifice our careers to earn that tiny amount; are we slaves or what? I'd rather work in McDonald's. They pay 9.6 Yuan per hour, and the staff can get half-priced burgers!

She concluded by making some comments about the gendered nature of marriage in general:

'Seriously, if men are reliable, then pigs can climb up the trees, too! Gay men are just as untrustworthy as straight ones, so women should best be self-dependent. Cooperative marriage is like any marriage – they are all stark-naked transactions! We should just put on the table what we want from marriage. If you don't agree, then leave and find someone else. Don't try to take advantage of anyone.'<sup>124</sup>

Fei's comments do voice the complaints many (lesbian) mothers are holding back. And her observation of marriage as transaction is a sharp one, and one that has long been attested to by Marxist feminist scholarly works.<sup>125</sup> As lesbians are more sensitive to the unequal nature of the institution of marriage, few of them are willing to conceive a child with a gay husband.

122 Such 'pseudomutuality' has been discussed in Section 3.3.1.

123 Which was then about 1.3 euros.

124 Acknowledgement to Yuan Yuan who provided me this excerpt among other cooperative-marriage stories she collected online.

125 Gayle S Rubin, 'The Traffic in Women: Notes on the "Political Economy" of Sex', *Toward an Anthropology of Women* (1975); Engels, *The Origin of the Family* (1884).

In fact, the most frequent trigger for fights between lesbians and gay men who are in or seeking cooperative marriages is the 'kid problem'. As Xiong, the initiator of the aforementioned cooperative-marriage matchmaking group,<sup>126</sup> told me, organizers like her have come up with an idea to minimize disagreements. They divide a group into two subgroups: a 'wanting-child' one and a 'no-child' one. People are then expected to find the right match more easily by filtering out those who have different family plans. Interestingly, such division leads to an overt gender imbalance – gay men in the wanting-child subgroup dramatically outnumber lesbian women, and vice versa. This again may hint at the often-underappreciated work women do as mothers.<sup>127</sup>

The 'kid problem' may also suggest that for Chinese men the most constraining part of the straightjacket is probably the duty to procreate rather than getting married, which is also shown in Zhao Jun's mother's quick acceptance of his homosexuality when he had a child yet not a wife.<sup>128</sup> In contrast, Chinese women are more likely to have the double pressure of getting married *and* having children within marriage. Being single mothers is legally and economically difficult,<sup>129</sup> whereas being childless, whether in or outside of marriage, can also incur gossips. Between rock and a hard place, lesbians seem to find it relatively acceptable to only have a social outfit of different-sex marriage while rejecting the onerous responsibilities of motherhood within heteronormative families.

Meanwhile, *tongqis*' using of 'womb fraud' also provides discursive resources for other women to rethink sacrifice and maternal love. In a forum called 'Failed Cooperative Marriage Bar', a lesbian blogger told her story of being almost defrauded by a straight man who pretended to be gay and would like to have her as a free surrogate mother.<sup>130</sup> She concluded that a man's sexual orientation has no bearing on 'womb fraud' as it is being committed by gay and straight men alike, while being 'swindled' an experience common to women's be they lesbian or straight.<sup>131</sup> Biased as her words sound, lesbians' reluctance to give birth in a cooperative marriage may indeed be another signal of emerging feminist awareness, which has made the existing gender inequality in marriage and reproduction in 'ordinary' marriages more visible and more openly discussed.

While the above accounts rightly point out certain structural power imbalances in the patriarchal institution of marriage, we should not ignore that married men can acquire ideas of egalitarian parenting, although they

126 See Section 3.3.1.

127 Susan J Douglas and Meredith W Michaels, *The Mommy Myth: The Idealization of Motherhood and How It Has Undermined Women* (Free Press, New York, 2004).

128 See Section 4.3.2.

129 See Sections 4.2.1, 4.4.2, 4.2.6 and 4.3.1.

130 Little Prince in the Moon, "'Womb Fraud' is Irrelevant to A Man's Being Straight or Gay' (骗子宫, 还分什么直男与GAY), *Failed Cooperative Marriage Bar* (形婚失败吧), 22 November 2015, at [www.webcitation.org/6nU2opzA6](http://www.webcitation.org/6nU2opzA6).

131 Ibid.

may not call themselves feminists. Jasmine told me about the parenting experiences in her cooperative marriage:

'In the beginning, my gay husband often annoyed my partner and me. He just left us some money, and was rarely grateful for the time and effort I devoted in getting pregnant and giving birth. After a few small fights, now he's become much more considerate to me, my partner and the child.

I told him that he didn't have to come over to see the child every day, but he insisted. Since he's witnessed all my efforts, he's shown me much more respect ... Over time, we've really started to feel that we're comrades standing by each other.'

Jasmine used the word 'comrade' to describe her familial relationship with a gay man, who gradually learnt to be more caring and responsible in a marriage where he cannot just play the breadwinner. Although same-sex-oriented people do not live entirely free from the constraints of hetero-patriarchal laws and thoughts, the subtle changes exemplified by Jasmine's comradeship are giving new meanings to marriage and parenthood bit by bit.<sup>132</sup> And it is in such comradeship that gay male identity and feminist awareness converge. Such convergence requires the dedication of both partners, which, as explained above, is oftentimes not the easiest option for (gay) men. It is foreseeable that more conflicts and coalition will emerge in the ongoing transformation of family and its laws.

#### 4.6 CONCLUSION

As with marriage, a host of social-legal norms in pluralist Family Law are concurrently governing the domain of parenthood. FL1, namely the official laws on the narrowly understood family issues, include the 'birth permit', assumption of paternity, guardianship, adoption, fostering and assisted reproductive technologies (ART).<sup>133</sup> Through these laws we have seen how tightly childbearing and rearing are bound up with different-sex marriage. Meanwhile, several laws do acknowledge wider notions of kinship, which has the potential to be interpreted as recognizing same-sex families. For instance, one may obtain guardianship of a friend's child if no next-of-kin is suitable;<sup>134</sup> an eligible fostering family in Zhongshan city does not have to be a 'complete' or 'traditional' one;<sup>135</sup> and ART was, or may still be, open to unmarried women in Jilin province.<sup>136</sup> These possibilities have not been reportedly tested by same-sex-oriented people, but we may see activism that pushes the authorities to clarify the status of same-sex parenthood and

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132 For a discussion of queer comradeship between cooperatively married couples, see Wang, 'Cooperative Marriage' (2015).

133 See Section 4.2.

134 See Section 4.2.3.

135 See Section 4.2.5.

136 See Section 4.2.6.

other forms of parenting outside of a 'normal' marriage. FL1 also appear in the judgments of court cases, as we saw in the custody disputes, where the sexual orientation of one parent is weighed differently.<sup>137</sup>

Some FL2 and 3, i.e., the laws regulating family relationships in seemingly non-family terms, appeared in this chapter, such as the laws and policies on employment, household registration (*hukou*) and the establishment of sperm banks. FL4 is powerful in many ways: same-sex-oriented young adults in China are facing huge pressure to become parents, especially those of the one-child generation;<sup>138</sup> the idea that adoptive children are not as '*qin*' as biological ones;<sup>139</sup> the medical standards in CCMD-3 that continue to partly pathologize homosexuality are appropriated to deny foreign same-sex couples to adopt Chinese children;<sup>140</sup> the cultural norm of marriage and procreation as counterbalancing bad luck for their family members (*chongxi*) has influenced some people's decision to marry hastily;<sup>141</sup> and the commonplace belief that housework and child-rearing labor are 'invaluable' thus actually valueless have made married women, whether lesbians or *tongqis*, more likely to feel underappreciated. Meanwhile, some FL4, while onerous, can also be useful. For instance, *guanxi* (social connection), or 'Chinese characteristics' as one respondent calls it, has become a soft yet powerful weapon against unsympathetic laws.<sup>142</sup>

Inevitably, heteronormative Family Law in China has been contested, tacitly if not outspokenly, because same-sex parenthood has become an irreversible fact, a real-life arrangement rather than a remote fantasy. Same-sex oriented people have made it happen in many ways, with various kinds of legal consciousness. Some of them have become parents 'against the law', without first getting formally married, but via in vitro fertilization, transnational surrogacy, or *de facto* adoption.<sup>143</sup> In these cases, the lack of marriage certificate creates many barriers and they often have to surf legally grey areas in order to surmount them. *Guanxi* (often fueled with money and/or gifts) then has an important role to play. Of course, it offers much less certainty than a law that clearly grants rights to more subjects and relationships other than marriage, and maintaining *guanxi* often entails extra financial and emotional investment.

In comparison, having children in a formal marriage – before or with the law – is a most cost-effective means of becoming parents, which also produces the greatest degree of social 'normalcy'. The substantial and procedural legal conveniences partly explain why many same-sex oriented people opt for cooperative marriages, or for marrying an unsuspecting

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137 See Section 4.4.1.

138 See Section 4.1.

139 See Section 4.3.3.

140 See Section 4.2.4.

141 See Section 4.4.2.

142 See Section 4.3.1.

143 See Section 4.3.

person of another sex. In the latter case, however, the 'gay' men are berated for having committed 'womb fraud', because they fail to fulfill *tongqis'* expectations of becoming parents with a loving, heterosexual husband. The 'womb fraud' discourse, just like that of 'marriage fraud' discussed in the previous chapter, is built on the essentialized idea of inborn and immutable homosexuality, a crucial truth about which one must be forward and frank; it also bundles marriage with hetero-romantic sexual love.<sup>144</sup> It again brings to the fore the contradictory demands made on same-sex-oriented people both to become a parent in a straight marriage and to confess the 'gay truth' to their spouses. Consequently, the 'womb fraud' dilemma has posed a pressing question for the lawmakers: if 'defrauding' an unwitting person is not the optimal choice for some same-sex-oriented people, should they be provided with lawful means to become parents alone or with their same-sex partners?

While its homophobic connotation should be criticized, the popularization of the 'womb fraud' discourse among *tongqis* and some lesbians does suggest the rise of feminist awareness in these women, especially with regard to their unpaid and underappreciated efforts in childbirth and child rearing, on top of other domestic duties. This also explains why many cooperative marriages fail even at the negotiation stage: gay men find lesbians 'too greedy' for asking for too much money or care, whereas lesbians see gay men 'too selfish' in placing too little value on their efforts and sacrifices. Such conflicts are unavoidable in a complicated Chinese society where 'progressive' egalitarian and 'conventional' patriarchal ideas about marriage and parenthood are competing for legitimacy in every aspect of Family Law.

Similarly, although the gay rights and women's rights movements often fight together against hetero-patriarchy, when it comes to the issue of reproductive justice, the two do not always have the same focus: while the latter tend to highlight how mothers are disadvantaged in a largely patriarchal society, the former often stress the heteronormative familial and social imperatives that push gay men to marry straight women and to procreate in the first place. In fact, these two angles are not necessarily contradictory, especially when we realize they are both contextualized in hetero-patriarchal family laws that do not offer people of any gender and sexual orientation feasible alternatives to the straightjacket. If we only bring into conflict women's rights and gay men's rights, we may lose sight of the interwoven strings that trap everyone in the normative kinship system that valorizes marriage, reproductive sex and biological ties, while undervaluing other family forms.

Last but not least, without denying some same-sex-oriented people's whole-hearted love of kids, we should nevertheless pay attention to the socio-legal environments that play a crucial part in constructing their

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144 See Section 4.4.2.

'internal wish', the wish to have children, to give their children a 'complete', 'stable' and 'normal' family, as well as their parents' zealous expectation for grandchildren in such a family. One significant constructive factor is the common belief that raising a child is a worthy investment for one's later life.<sup>145</sup> Such an 'old-age-insurance' function of marriage and childrearing still persists, and even valorizes nowadays, when social welfare is drastically shrinking and healthcare is being increasingly privatized. This has perpetuated the arc of 'victim-victimization' from one generation to another, meaning that even though the old generation may not be happy in this straightjacket, they do not want to see their children exempt from it.<sup>146</sup> I will discuss in next chapter on how same-sex-oriented people, their partners, spouses and parents imagine and experience their old age – before, with and/or against family law. There, we will also see how the straightjacket further requires Chinese people to get eldercare in a hetero-reproductive family, which generates much anxiety, fear, yet also some unexpected care-free feelings.

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145 Lung-kee Sun, 'Contemporary Chinese Culture: Structure and Emotionality' (1991) 26 *The Australian Journal of Chinese Affairs* 26, 1-41, 39.

146 Ibid.

