

No One Is At Fault  
Reconstruct Fault in Fraudulent Marriages

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## Abstract

This article examines the current legal situation in mainland China of gays and lesbians marrying straight spouse to conceal their sexual orientation. It takes up angles from both sides in examining the problematic consequences brought by the ‘marriage fraud’, arguing the law is unable to protect neither the unwitting spouse nor gays and lesbians. Especially through analyzing legal cases, it questions the ‘fault divorce’ norm on divorce trial, which essentially misleads both parties and the court’s judgement. The structure of the article begins by constructing the background, problem, and potential solutions for ‘marriage fraud’, then explores the current legal situation, legal reasoning, and legal cases to show that fraudulent marriages is only effective in a superficial context. It cautions that fraudulent marriages, if perceived as an attractive strategy by queer people to get away from family pressures and social prejudices, may burden queer communities with unfavorable reputations and inability to pursuit rights in marriage.

## Keywords

Fraudulent marriages, fault divorce, no-fault divorce, queer rights, *tongfu/tongqi*, law

## Introduction

The people’s court of Haidian, Beijing grants Cui (wife) and Qin (husband) a divorce. The reason is that Qin is gay, and according to Cui, “[he] refuses to sleep with me, and I found out he is gay five days after our wedding.”<sup>1</sup> In response to Cui asking why he

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<sup>1</sup> China Judgement Online. 2016.” Cui X vs. Qin X Divorce Dispute First Trial Civil Judgement.” <http://wenshu.court.gov.cn>

would marry her in the first place, Qin retorts, “In order to trick you into this marriage.”<sup>2</sup> For Cui, the marriage was broken not only because her husband was unable to fulfill the couple’s physical obligations (sexual intercourse), but also due to the deceptive nature of the marriage. However, Qin originally told Cui that he was unable to perform sexually because he had a knee injury, not because of his true sexual orientation. In addition to the divorce, Cui asked for compensation for mental anguish totaling 100,000 yuan (\$15,000), whereas Qin countersued for the return of the betrothal gifts (the diamond engagement ring, the wedding rings, a diamond necklace, and a gold bracelet). The court denied all these requests after thorough investigation, yet still granted the divorce based on Article 32, section 2 of the Marriage Law, describing a situation in which when “there is family violence or maltreatment or desertion of any family member.”<sup>3</sup> *Cui vs. Qin* is one of 82 results of court records from China Judgements Online<sup>4</sup> containing entries from 2008 to the present after searching the keyword “homosexual.” Of the 82 search results (from which duplicate titles were excluded), 40 divorce cases were found. After carefully studying these 40 classic cases, I refined and selected individual representative cases based on the cluster of concerns, as the objective of this research project; I will first examine cases involve the wives of gays, and then the husbands of lesbians, and finally the judgement based on violation of other legal provisions.

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<sup>2</sup> "Cui X vs. Qin X Divorce Dispute First Trial Civil Judgement." 2016

<sup>3</sup> Standing Committee of the National People’s Congress. 2001.” Decision of The Standing Committee of The National People's Congress on Amending The Marriage Law Of The People's Republic Of China". *En.Pkulaw.Cn*. Article 1: The “family violence” as mentioned in Articles 3,32,43,45 and 46 of the Marriage Law refers to a behavior whereby a person causes certain physical or mental injuries to his family member(s) by beating, binding, forced restriction of personal freedom or by other means. Durative or frequent family violence constitutes maltreatment.

<sup>4</sup> "China Judgement Online," 2019

In China, perceptions toward sexual minorities are still biased and the rights of queer people are neither recognized by society nor protected by law. Because same-sex marriage is currently illegal in China, gay and lesbians have only three feasible options in order to maintain their relationship: 1) remain unmarried due to the inability to obtain a legal marriage license, some of them claiming “friendship” in order to conceal their sexual orientation 2) some form of open marriage where both sides are informed about the gay identity, and the purpose of the marriage is to appease family and social norms, often bound by a mutual premarital agreement clearly stating the interest of the marriage in order to protect both their assets and their honor, and 3) quite arguably the most problematic one, the fraudulent marriage, which refer to a gay/lesbian seeks to conceal his or her sexual orientation by marrying a heterosexual spouse. This final option is possible only because, in China, lying about one’s sexual orientation does not constitute legal permission for annulment or divorce.<sup>567</sup> If the divorce case goes to the court, the

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<sup>5</sup> In the United States, an annulment case can be initiated if grounds on the condition of Fraud — one of the spouses agreed to the marriage based on the lies or misrepresentation of the other, for example, lying about one’s sexual preferences. See Banks, Louise. 2009. “What’s the Legal Difference Between Annulment and Divorce?” <https://www.legalzoom.com/articles/whats-the-legal-difference-between-annulment-and-divorce>

<sup>6</sup> Supreme People’s Court. 1989.”Zuigaorenminfayuan gaunyu renminfayuan Shenli lihun anjian ruhe rending fuqi ganqing queyi polie de ruogan juti yijian [Several Specific Opinions Of The Supreme People’S Court On How The People’S Court Determines That Mutual Affection No Longer Exists Between Husband And Wife.]” <https://www.pkulaw.cn>

<sup>7</sup> The divorce section of the Marriage Law does not specify what evidences it will consult, and neither states that a party should be find as guilty or not. Stated in Article 25 of the Marriage Law “If one party alone desires a divorce, the organization concerned may carry out mediation or the party may appeal directly to a people’s court to start divorce proceedings. In dealing with a divorce case, the people’s court should carry out mediation; divorce shall be granted if mediation fails because mutual affection no longer exists.” Although the Marriage Law does not mention ‘fault divorce’, it does use the term ‘innocent’ in Article 46. See National People’s Congress. 2001.” Decision Of The Standing Committee Of The National People's Congress On Amending The Marriage Law Of The People's Republic Of China.” *En.Pkulaw.Cn*. Article 46. In any of the

court needs to find out which party is at fault. Currently, China does not have no-fault divorce option, hence, when a spouse inevitably discovers they have been horribly misled, their attempts at filing for a divorce and/or suing for damages for mental anguish rely on their ability to prove another party is at fault. In most of the cases, the spouse believes prove the other party's gay/lesbian identity makes him/her the "guilty party".

The third option can be categorized as a fraudulent marriage. It has become a growing trend that has prompted attention for scholars, and in this paper, I attempt to unpack this problem through various lenses. In the research, some scholars believe that the straight man/woman (*tongqi/tongfu*) is the only victim in fraudulent marriages, often ignoring that homosexuals are equally victimized because of the stigmatization and negative social impact derived from these divorce cases. The continued growth of fraudulent marriages will not only affect gender equality and freedom of marriage, but also spread negative social attitudes and deepen the social conflicts about homosexuals within the society. Gays and lesbians should have the right and freedom to choose how they live with their partners instead of concealing their sexual orientation and entering into a deceptive heterosexual marriage, all the while surrendering to damaging cultural conventions.

The urgent problem consists of three dimensions. First, gays and lesbians still choose to enter fraudulent marriages, without realizing this option is ineffective that would not help

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following circumstances which has led to the divorce of husband and wife, the innocent party shall be entitled to claim damages: (1) bigamy; (2) cohabitation between a person who has a spouse but co-habitats with a third person; (3) familial violence; (4) maltreating or deserting any family member. Hence, 'fault divorce' establishes if one party is innocent and the other party is guilt.

them get away from social and familial pressures. The unclear legal jurisdiction criteria exist in these divorce cases confuse both the plaintiff and the defendant by evading the crucial conflict (to prove homosexuals at fault). Second, the exposure of the fraudulent marriages' cases will bring more people standing against gays and lesbians. It may be difficult to change people's mind for those who think homosexuals are unacceptable, but biased media exposure and scholars' lack of attention paid to gays and lesbians exaggerate the negative social impact of these divorce cases. Third, the current legal situation for divorce in China is still based on assertion of fault, which is different from most European states, where divorce is granted when both sides (or one side strongly insists) think the marriage no longer works, and no need to prove any party at fault. As a consequence, the unawareness of these gays and lesbians who involved in these incidents along with the continued ignorance of the law and the society would intensify the tension among all parties. Whenever gays or lesbians enter fraudulent marriages, they think they would get away from family pressures and social prejudices, as a matter of fact, they are risking their future chances to pursuit freedom of marriages and increasing the possibility to be detested by the society. Nevertheless, things are different in any form of open marriages, which does not include dishonest, and works well; some parents of gay/lesbian do not mind if their child's marriage is a fraud because the law would not punish the homosexual harshly, even if the case exposed by media, they can bear the consequences. However, in the long-run, if the society hostility towards gays/lesbians continue to increase, it is impossible for either legal legislation or legal jurisdiction to precede social prejudices and bias against homosexuals would forever inherited. By choosing this option,

gays/lesbians burden themselves with unfavorable reputations and inability to pursue rights in marriage.

For gays and lesbians in China who enter into fraudulent marriages, they may believe that this option is the best way to evade familial and social pressure without causing any harm. They believe their homosexual identity would be effectively concealed in this way, and their family will be satisfied with the fact they are married. Not only will their identities be protected, but they also think that their legal rights will be as well. Yet, the fact is, while the absence of legal legislation in addressing issues associated with homosexuality does help many gays and lesbians escape responsibility for entering into fraudulent marriages, this approach is only effective in a superficial context. Through analyzing the existing divorce cases involving homosexual fraudulent marriages, there exist a series of problematic consequences outlined in scholarship from the fields of economics, law, and cultural studies. Therefore, it is important to reconsider the utility of fraudulent marriages and for homosexuals to ascertain its potential negative consequences. Fraudulent marriages, rather, are not a good option for them to achieve their goal of freedom and further tarnishes their rights in pursuit of marriage equality in the long run.

Scholars have different concerns on the problematic consequences derived from fraudulent marriages. Yu Qijia, who currently served in national special force and held the juris doctor degree, has been investigating on the victimization of *tongqi/tongfu* in fraudulent marriages.<sup>8</sup> Yu regards *tongqi/tongfu* as the primary and the only victim in the marriage and argues the law should regulate homosexuals in legislation in order to

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<sup>8</sup> Yu, Qijia. 2016. "You Peiou Zhe yu Tongxing Tongju Falv Wenti Yanjiu [A Married person with same-sex cohabitation Legal Issues]" M.A Thesis., Shenyang Normal University

effectively prevent homosexuals from entering the fraudulent marriage under social and family pressure and causing harm to *tongqi/tongfu*. However, the cases suggest not only *tongqi/tongfu* is victimized in the marriage, homosexuals themselves are indeed harmed by the form of marriage. I find those who regard *tongqi/tongfu* as the only victim because they fail to take into the account that homosexuals are also victimized by entering this form of marriage under social stigmatization. I suggest both homosexuals and *tongqi/tongfu* are victimized by the traditional norms, moral judgement, and social conventions that deeply inherited in Chinese society.

Although the paper will focus mainly on analyzing legal cases, a documentary called *Small Talk (richang duihua)* produced by Huang Hui-Chen, an Asian American women media maker, records Huang's dialogue with her mother, a lesbian married, and after having two daughters, divorced to a straight man. In this documentary, the mother always remains silence in front of the camera when facing the questions raise by her daughter, such as "Do you know my father raped me when I was young?" "Are you looked like a boy since you were young?" "Do you think there is anyone in this world understanding you?"<sup>9</sup> The mother often bows her head and remain silent. Huang also interviews her mother's lover (former girlfriend), who says her mother is a really gentle lover. The mothers' attitude toward the father is clear when she says: "If homicide does not break the law, he is the first one I killed."<sup>10</sup> The father rapes and beats Huang's mother, Huang, and Huang's sister, which makes Huang's mother never want to remember and

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<sup>9</sup> Huang, Hui-Chen. 2018. "Small Talk (Richang Duihua)" <https://www.bilibili.com/video/av34297688/>.

<sup>10</sup> "Small Talk (Richang Duihua)." 2018.

confronting the past. Until the end of the documentary, the mother never admits her love to the daughters because she thinks they are the result of crime, the evidence of the shameful past.

The documentary presents the suffering and the victimization of lesbians in the case of horrible marriages (as a result of social conventions), which begins with the story of a woman who should not marry to a man, while this is only the tip of the iceberg. According to Zhang Beichuan, a scholar from the Medical Research Institute of the Affiliated Hospital of Qingdao University, estimates gay man usually takes up 3%-4% of the male population, and there are more than 80% gay (1.6 million) chooses to marry a straight woman.<sup>11</sup> The demographic statistics in 2018 shows there are 71.4 million males, so the number of gay to marry increases to 2.3 million, while female population is 68.1 million, if lesbians takes up approximately 4%, the number of lesbians to marry straight man is 2.2 million.<sup>12</sup> However, Chinese law purposefully avoids addressing the issue related to gay and lesbian mainly because of its sensitive nature and because the legal system is void of clear regulations about homosexual behaviors or groups. This paper does not aim urge the law to produce legal legislation for homosexuals, but to think of possible improvement through understanding legal jurisdiction. After all, the complexity and fluidity of a person's sexual orientation are rather complicated to be prescribed by law—even in the international world, medical psychology is still attempting to define the

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<sup>11</sup> Di, Yufei. 2015. “Zoujin Zhongguo de “Tongqi” he “Tongfu” [Getting to Know ‘Tongqi’ and ‘TongFu’].” *New York Times*.  
<https://cn.nytimes.com/lifestyle/20150514/t14marriages/>

<sup>12</sup> “2018 nian guominjingji he shehuifazhan tongji[National Economic and Social Development Statistic Report of Year 2018].” 2018.  
[http://www.stats.gov.cn/tjsj/zxfb/201902/t20190228\\_1651265.html](http://www.stats.gov.cn/tjsj/zxfb/201902/t20190228_1651265.html)

essence of homosexuality. Rather, this paper aims to discover if and how the law could address these problems in jurisdiction level to help resolve concerns for the injured spouse, and with the potential advocacy for queer rights in the long-run.

### **The Legal Situation**

Through the role and effectiveness of the law in the case of fraudulent marriages, we see a clear avoidance of homosexual issues which is perpetuated, to some extent, for the legal protection of gays' interests (in marriage). However, this legal evasion gay/lesbian issues have, in fact, created an even deeper divide between queer people and heterosexual individuals, which in turn has made it a more ingrained as a social issue. Therefore, the illegitimate "sham" marriage model causes both homosexuals and *tongqi/tongfu* to be victimized at the same time. This is also what *tongqi/tongfu* scholars have failed to address. They typically believe that it is only *tongqi/tongfu* who are victimized and ignore why homosexuals feel the need to enter into 'marriage fraud'. It is a vicious cycle brought about by an intolerant society. Although the silence of the law "protects" homosexuals by not forcing them to compensate for mental anguish to their spouse (usually the consequences of the fraudulent marriage, or simply, a divorce), if the law continues its silence, the homosexual community will be misguided and continue the route of 'marriage fraud'. The economic interests of the weaker party rarely addressed due to the fact that divorced women in China typically lose their rights to shared property and often to the children. If wives/husbands of gays/lesbians can get fair share of joint property or reasonable parental rights, they no longer need to demand divorce by accuse

the other for being gay/lesbian. That's being said, if the weaker party's economic interests were protected by law, no-fault divorce option might be accepted by the couple.

Here, the problem of homosexual fraudulent marriage is different from heterosexual fraudulent marriage or marriages of conveniences based on economic and political reasons because the effect of homosexual choice to defraud is in fact contrary to the result. The reason why gay and lesbian enters 'marriage fraud' is that, excerpted from two of the cases, they are "forced by parental pressure"<sup>13</sup> and have attempted to "appease [their] parents."<sup>14</sup> Yet, this pressure and accountability actually come from their family and their society as a whole. Under the moral values of traditional Chinese families, children are obliged to marry and reproduce; therefore, homosexuals must hide their sexual orientation and deceive their parents in order to protect themselves and their families from criticism. However, when and if this fraudulent marriage is exposed, it will inevitably lead to marriage problems. The threats, the exposure of one's sexual orientation, the issue of property division if divorce is incumbent, alimony, and child support are all problematic legal issues if a marriage were to dissolve. In some cases, homosexuals hide their sexual orientation in order to hold on to a marriage. However, these exposed cases of fraudulent marriages have already caused the society to cast a dark curtain on homosexuality, because the society would condemn gays and lesbians for their identity that hurts the heterosexuals who are in a "relationship" with them.

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<sup>13</sup> China Judgement Online. 2015." Xiang vs. Zhou Divorce Dispute First Trial Civil Judgement." <http://wenshu.court.gov.cn>

<sup>14</sup> China Judgement Online. 2017. "Zhang Vs. Yang Divorce Dispute First Trial Civil Judgement." See Also. 2016." Cui Vs. Zhao Divorce Dispute First Trial Civil Judgement." <http://wenshu.court.gov.cn>

Scholars should be concerned about the evasion of legal provisions in these mixed-sexual orientation marriage cases. Through analyzing divorce cases involving homosexuals, scholars find out two important loopholes, which are the major reasons for laws inability to protect either the rights of homosexuals and *tongqi/tongfu*: 1. Evidentiary burden faced by the spouse, who presents the evidence to prove the other party as homosexual is often unclear and ineffective. Evidence such as recordings, communications through social media, chat histories, and even a written acknowledgment by homosexual themselves cannot be used as valid evidence. Hence, the spouse is unable to prove the other party is at fault, unable to get fair compensation or equal division of property or the custody of the child (if any). 2. Not to mention those who are accused of homosexuality, they usually do not admit that they are homosexual in court. Even if one directly admits being homosexual, the judgment will not be heard on the grounds of “no previous case” or “no relevant law.”<sup>15</sup> This lack of legal definition and consequence creates a perverse set of incentives for homosexuals who wish to marry in China. Because the law bars same-sex marriages, homosexuals cannot legally pursue honest marriages with willing partners of their own sex. This leaves the options either to remain unmarried, or to marry someone of the opposite sex. Because there is not legal consequence to commit ‘marriage fraud’, homosexuals in China are effectively incentivized to engage in these marriages as the least bad option. This option can be demonstrated to create stress for unwitting partners in the short-term, and to exacerbate social hostility toward homosexuals in the long term. Thus, it is necessary to close the legal loopholes that ultimately entice fraud and promote hostility between gay and

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<sup>15</sup> ” Cui X vs. Qin X Divorce Dispute First Trial Civil Judgement.” 2016

straight Chinese. These two loopholes can be resolved by establishing effective legal criteria in order to prevent fraudulent marriages.

In an attempt to address these problems accordingly, the best and simple solution is to introduce no-fault divorce. According to the legal dictionary, no-fault divorce refers to neither spouse is required to prove “fault” or marital misconduct on the part of the other.<sup>16</sup> The unwitting spouse who feels mistreated would no longer need to prove that the husband (wife) is a closet homosexual; instead, they decide that the marriage has broken down. Currently, the court is avoiding addressing homosexual is at fault, but the injured spouse often insists, and the court have to rule homosexual at fault under such pressure. The law can change structural factors, to protect the economic future of the weaker party, thus avoiding potential conflicts based on economic interests. In most of the cases, the major conflict between the couple is on the division of post-nuptial property, betrothal gifts, and custody of the child; the wives often afraid of not being able to get fair share of the joint property or the custody of the child, and worries if she has to return the betrothal gifts. If the law can protect the interests of injured spouses, there is no need for them to prove fault and claim compensation from another party.

Solving the issue from structural changes can be beneficial to both parties, while improvements on legal criteria could also supplements the effectiveness of the solution. The court is acting quite reasonably in not considering sexual orientation at fault, because it is something that is difficult to prove and not legally relevant; it is often the injured

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<sup>16</sup> "No-Fault Divorce." 2019. *LII / Legal Information Institute*.  
[https://www.law.cornell.edu/wex/no-fault\\_divorce](https://www.law.cornell.edu/wex/no-fault_divorce).

spouse insists on proving one's gay identity in order to get one punished. Although, in most of the cases, the alleged gays and lesbians often declined to confirm their sexuality in front of the judge, and the court made efforts to avoid these assumptions, yet if their homosexual behavior was made plain, the court's criteria in determining who is at fault includes being "homosexual." Therefore, I propose to increase the efforts to educate the general public about the criteria for mental anguish, as one of the most frequent request made by the injured party. Also, the state can organize legal aid services and promote general knowledge to the public to raise social awareness in terms of freedom of marriage and individuality of personhood, as ways to become independent from family and parental control. Finally, 'homosexual' should be considered as a neutralized term under legal legislation, because only in this way, the society's understanding for homosexual may not be distorted by the media exposure of the 'marriage fraud'.

### **Wives of Gays (*tongqi*) Appeal Compensation for Mental Anguish**

Due to increasing media attention of legal cases regarding fraudulent marriages, the deceived spouses (ones that did not knowingly entered the marriage) collectively form discussion forums and publicly proclaim themselves as wives or husbands of gays/lesbians (*tongqi/tongfu*). Through my investigation, many cases of fraudulent marriages have come to light in China.<sup>17</sup> In fact, it seems to be the partnership of choice among an increasing number of homosexuals since the law does not recognize gay marriage, there is social prejudice against homosexuals, and there is familial pressure for marriages to produce offspring to continue their lineage. Chinese law purposefully avoids

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<sup>17</sup> "China Judgement Online." 2019

the issue of homosexuality mainly because of its sensitive nature and because the legal system is void of clear regulations about homosexual behaviors or groups. The following cases in this section show the evidentiary burden in proving one's gay identity, the judgement and appellant accusation for "homosexuals are morally at fault", and the public reactions to the media exposure of fraudulent marriage.

In 2015, Zhang (the wife) and Yang (the husband) were introduced to each other by their neighbor and were married in May 2016. Although they lived together, they did not have children. Zhang discovered that Yang was a homosexual soon after the wedding, realizing that the purpose of the marriage was for Yang to appease his parents and conceal his sexual identity. Yang knew he was a homosexual but deceived Zhang, nonetheless. Zhang claimed she had tremendous emotional suffering and even physical injury, and she should be considered as the only victim of this 'marriage fraud'. Therefore, Zhang not only filed for divorce, but also filed a lawsuit with the court for compensation totaling 100,000 yuan (about \$15,000) for mental anguish along with requesting Yang providing a public verbal apology for being gay and defrauding her. Yang agreed to the divorce but not the compensation nor the apology; rather, he requested Zhang to return the betrothal gifts (*caili*) and other wedding expenses totaling 56,501 yuan (\$8432).

During the course of the trial, in order to prove that Yang engaged in homosexual behavior, Zhang provided recorded proof of a dialogue between them as his confession. Zhang also entered into evidence a number of homosexual CDs (gay-porn) found on Yang's computer. Yang denied that the confession was genuine and explained that he was in possession of the pornography strictly because of his job in the television industry.

The court ruled out the audiotaped confession because Yang claims he is trying to get back Zhang during the conversation. However, the court held that homosexual pornography was not related to the nature of Yang's work and ruled in favor of the evidence as proof of the defendant's homosexual behavior. Yang countered that Zhang's intention to divorce was a ploy to obtain money. The court finally ruled that Zhang's request for divorce was supported and that Yang's homosexual behavior was at fault.

Below is an excerpt from the official judgement:

The accused's homosexual behavior damaged the relationship between the husband and the wife and is also contrary to the current normal mainstream concept and traditional ethics. As for the plaintiff's (Zhang) claim that the defendant (Yang) and his homosexual sexual acts have caused the plaintiff mental harm, her right to mental compensation and an apology is not granted. There is no relevant provision in China's current laws and relevant judicial interpretations regarding homosexuals; the plaintiff did not provide valid evidence to prove that the defendant's behavior should be considered as the necessary condition for mental damage compensation. Therefore, this court does not support this.<sup>18</sup>

In this case, the only reason for Zhang's divorce was because of her husband's gay identity and intent to secure a fraudulent marriage. It is evidenced from the judgement above that the court ruled Yang engaged in homosexual behavior because of his collection of gay pornography, which was grounds for divorce. However, on the basis that "the current law in China and related judicial interpretations have no relevant

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<sup>18</sup> China Judgement Online. 2017. "Zhang vs. Yang Divorce Dispute First Trial Civil Judgement." <http://wenshu.court.gov.cn>

regulations,"<sup>19</sup> for homosexuals, the mental damages that Zhang appealed on were rejected. This case is the only one among all 40 in which the evidence provided by the wife (*tongqi*) was effective in demonstrating the husband's sexual orientation.

This was different from other cases, such as Zhong and Liu's second trial in a civil property dispute (2019)<sup>20</sup>, in which medical records and diaries were evidence to prove Zhong's previous husband, Xing, had concealed his homosexual orientation before marriage. Zhong claimed there was moral fault in Xing failing to fulfill the husband's obligations, demanding a divorce and asking for 100,000 yuan (\$15,000) from the betrothal gift plus legal fees. In 2017, Xing was diagnosed as: "Mental burden, homosexuality waiting to be diagnosed"<sup>21</sup> at Hui' Ai Hospital in Guangzhou. The court found that, although the hospital diagnosed Xing as having a mental disorder, it was not prohibited by the Marriage Law<sup>22</sup>, which means that being a mental burden did not prohibit one from marriage; therefore, Zhong's appeal was dismissed. Yet, on the other hand, the mental burden affected the couple's relationship, so the court legally granted Zhong and Xing to a divorce. At the same time, Zhong needs to return a portion of the betrothal gift to Xing and bear the legal expenses. In *Zhong and Liu vs. Xing*, diaries,

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<sup>19</sup> "Zhang vs. Yang Divorce Dispute First Trial Civil Judgement." 2017.

<sup>20</sup> China Judgement Online. 2019." Zhong1、 Liu Dispute Over Marriage Property Second Trial Civil Judgement." <http://wenshu.court.gov.cn>

<sup>21</sup> Ibid. It is unclear why the hospital provides this diagnosis even if homosexuality was no longer considered an illness by that time, but the judgement stated as this "xinjingzhangai, tongxinglian dai pai [Mental burden, homosexuality waiting to be diagnosed]" See Coryell, William. 2018. "Cyclothymic Disorder - Mental Health Disorders - MSD Manual Consumer Version". *MSD Manual Consumer Version*.

<sup>22</sup> Supreme People's Court. 1989." Several Specific Opinions of The Supreme People's Court On How The People's Court Determines That Mutual Affection No Longer Exists Between Husband And Wife." <https://www.pkulaw.cn>

medical records, and psychological diagnoses were not valid evidence of homosexual behavior, and mental burden was not a prohibited disorder in marriage; evidenced in other cases, social media chat records<sup>23</sup>, the promising letter signed by homosexuals acknowledging sexual orientation<sup>24</sup>, and revealing, intimate photos of same sex actions<sup>25</sup> were not valid evidence as long as homosexual refused to recognize their homosexuality in court. Even if there were valid evidence to prove one's homosexual behavior, the court could not order the homosexual to pay for the mental damages of the spouse.

In both cases, homosexual behavior was judged as “having a certain fault”<sup>26</sup> and “having an adverse effect on the development of marital relations”<sup>27</sup> and was stated by the wife (*tongqi*) as a “serious moral fault”<sup>28</sup> In addition, she stated that “[Homosexuals] disregard social morality and violating public order and traditional good customs...[they have] despicable and shameful behavior.”<sup>29</sup> In almost all cases, the deceived spouses expressed their contempt for homosexual behavior and considered it grounds for punishment. However, due to the absence of relevant laws and regulations concerning homosexuality and marriage, the judgements could not address any other claim other than

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<sup>23</sup> "Cui X vs. Qin X Divorce Dispute First Trial Civil Judgement." 2016

<sup>24</sup> China Judgement Online. 2015. "The Plaintiff Wang Accuse the Defendant Li Divorce Dispute First Trial Civil Judgement". *Wenshu.Court.Gov.Cn*

<sup>25</sup> “Wang Li su Liu Yi Lihun Jiufen [Wang Li vs. Liu Yi Civil Dispute Divorce Case — Case from PKU Law]”. 2016. *Pkulaw.Cn*.

<sup>26</sup> Ibid.

<sup>27</sup> "Yang vs. Lin Divorce Dispute First Trial Civil Judgement." 2014

<sup>28</sup> “The Plaintiff Wang Accuse the Defendant Li Divorce Dispute First Trial Civil Judgement.” 2015

<sup>29</sup> China Judgement Online. 2017. “Zhang vs. Yang Divorce Dispute First Trial Civil Judgement.” *Wenshu.Court.Gov.Cn*.

ruling the dissolution of the marriage. In this case, the lack of relevant laws seems to have ruled in favor of homosexuals in avoiding certain economic losses, all the while giving them the ability to exploit this loophole in continuing fraudulent marriages. This potentially could cause a gay man to marry a woman with the caveat that they should be “careful enough.”

Same for the case of *Cui vs. Qin* (2016)<sup>30</sup>, which I present in the introduction, only five days after the wedding, the wife, Cui, finds out her husband Qin is gay after using his computer. In the end, the court ruled that the two parties could divorce while other claims about the division of property were rejected; the two pieces of evidence provided by Cui (chat records and recordings) appeared invalid because Qin denied a homosexual orientation and provided adequate doubt as to the veracity of the evidence.

Fraudulent marriages on the surface do not seem to impose harsh consequences on homosexuals themselves; in fact, they even seem to serve in the interest of homosexuals. However, each case of fraudulent marriages may actually create undo hostility toward homosexuals. The most sensational case in the media, the Luo Hongling suicide case<sup>31</sup>, is a salient example. Luo, an instructor from Szechuan University, committed suicide on June 15th, 2012. Luo’s case caused a great uproar as a *tongqi* suicide case. Luo’s parents sued the gay husband, Cheng, yet the court disagreed with Luo’s parents’ allegations against Cheng. Before Luo’s death, Cheng came out through social media (in microblog and within a friend circle), claiming himself as gay and

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<sup>30</sup> "Cui X vs. Qin X Divorce Dispute First Trial Civil Judgement." 2016

<sup>31</sup> He, Rui. 2013. “Chuanda tongqi zishaan yishe: bohui sizhe jiaren susong.[Szechuan University Tongqi Suicide Case: the court reject the appeal from family members of the deceased].” *News.Chengdu.Cn*. [http://news.chengdu.cn/content/2013-01/06/content\\_1128277.htm](http://news.chengdu.cn/content/2013-01/06/content_1128277.htm).

deceiving Luo into a marriage. He also messaged Luo these words: “I will go eat hotpot, have no interest in sex, I like to masturbate on videos.” Therefore, Luo’s parents sued Cheng based on the following claim: “Failure to fulfill the legal obligation to support a wife who is depressed due to a fraudulent marriage and encouraging her to commit suicide as a last resort.” However, People’s Court of Wuhou District, Chengdu, dismissed Luo’s parents’ charge against Cheng. The court ruled the following:

Luo Hongling was a person with full capacity for civil conduct in her lifetime. Her control of her emotions and the consequences of her actions made Luo Hongling herself the subject of legal responsibility. Whether Cheng has consoled, looked after, precaution, and prevented suicide does not result in the change and transfer of the subject of legal liability. Hence, the court will not support the plaintiff’s claim based on insufficient evidence of personal injury compensation for Luo Hongling’s death.<sup>32</sup>

The media exposure of *Luo vs. Cheng* makes this case sensational to the public, different versions of story with various detailed description can be found in multiple websites and forums. User luohonglingscu made a comment in 2012 “I don’t understand, her condition is pretty good, but that men are a base person.”<sup>33</sup> User Zhixiqian commented “I cannot imagine what had happened to make such a knowledgeable and mature woman to suicide for a ‘gay’! Not worth [to suicide] for a trash.”<sup>34</sup> Most common comments are either “gay

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<sup>32</sup> “Chuanda tongqi zishaan yishe: bohui sizhe jiaren susong.[Szechuan University Tongqi Suicide Case: the court reject the appeal from family members of the deceased]” 2013.

<sup>33</sup> Luohonglingscu." 2012. "Chuanda Jiaoshi Luohongling Zisha An: Yige Xinshande Nvhai Shizenme bei Haiside [Szechuan University Teacher Luohongling Suicide Case: How did a kind girl being killed].*Bbs.Tianya.Cn*. <http://bbs.tianya.cn/post-free-2615225-1.shtml>.

<sup>34</sup> Ibid.

should die” or “those who commit ‘marriage fraud should die’.”<sup>35</sup> The public opinion concerning these cases are almost always averse to homosexuality and the misconduct of fraudulent marriage. Because some homosexuals have partaken in a fraudulent marriage without thinking about the potential consequences of such a partnership, it causes increasingly profound damage to homosexuals as a group.

### **Cases Regard Husbands of Lesbians (*tongfu*)**

Compare to *tongqi*, it is much harder to find primary and secondary sources regarding *tongfu*. Among the 40 cases available in China Judgement Online, I can only find 4 cases involve lesbians. The lack of scholarly attention paid to lesbians and their husbands may due to the fact that women’s social status in China and the living conditions of lesbians are more vulnerable than men. Compare to gays when facing familial pressure, lesbians are even more targeted for nurture offsprings because women are often burdened with the responsibility to reproduce population. The following cases show the court evades the crucial conflicts (prove one’s homosexuality), and to some extent rules in the interest of the husbands. Since appellants ask for divorce in both cases, the court grants a divorce in *Cui vs. Zhao* (2016) in which the appellant is the husband, whereas decline the request in *Wang Li vs. Liu Yi* (2016) in which the appellant is an alleged lesbian.

In 2012, Cui (husband) and Zhao (wife) were introduced to each other by an acquaintance. Married in 2013, they had no children and never actually consummated the marriage. Cui discovered that his wife, Zhao, often excused herself from returning home at a decent hour by claiming that her work was really busy. Zhao also deliberately

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<sup>35</sup> Ibid.

avoided having sexual relations with Cui and even refused to share the same bed. One day in 2014, after being questioned by Cui several times, Zhao said that she actually had a girlfriend, and they had been living together for the past six months. According to Cui, Zhao claimed to be a lesbian who only married to appease her parents and friends. Cui also said that Zhao had asked for a divorce several times during their relationship. Cui had spent more than 300,000 yuan (\$44,776) to marry Zhao, expenses which included but were not limited to betrothal gifts, red packet (*hongbao*), and traditional marriage expenses. Cui also paid more than 150,000 yuan (\$223,88) for the loan that Zhao borrowed to put a down payment on both a house and car, in addition to renting a retail store location for her business. The judgement states that Cui claimed,

...the time of their marriage was short, and the plaintiff's (Cui) mental health was strongly damaged by the fact that the defendant (Zhao) is a lesbian. Cui cannot accept the fact that himself is married to a homosexual and he cannot continue to live with Zhao anymore.<sup>36</sup>

Therefore, Cui requested to divorce Zhao with return of the betrothal gifts (about 230,000 yuan, \$34,328). The property and debt should be equally divided. Zhao did not want a divorce and believed that the marital relationship was not broken, meaning she had no requirement to return the betrothal gifts. The court finally ruled that the marriage lacked of mutual understanding. Both Cui and Zhao were too careless in not establishing “true feelings” (*zhengzhengde ganqing*) after marriage. The relationship had indeed broken down, so the court ruled the dissolution of the marriage between Cui and Zhao, while

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<sup>36</sup> China Judgement Online. 2016. “Cui vs. Zhao Divorce Dispute First Trial Civil Judgement.” *Wenshu.Court.Gov.Cn*.

asking both parties to bear the joint debt of 50,000 yuan (\$7,462) that Zhao borrowed from Cui's father.

In *Cui vs. Zhao*, the accusation of Zhao being a homosexual only appeared in the plaintiff's statement. None of the subsequent evidence-providing and cross-examination phrases raised doubts about the sexual identity of the wife, neither did the due process mention any issue associated with a "homosexual" nature. The final judgment of the court also mentioned nothing about Cui's concern over Zhao's homosexuality. The court ruling for this case is based on the economic interests of both parties regardless of any conflicts base on sexual-orientation. Different from *tongqi*'s cases, the husband Cui does not have any evidences to insist on proving his wife's lesbian identity. Evidentiary burden is heavier for *tongfu* because first, lesbians tend to be more discrete, and there may be substantial evidence. Second, even if there was evidence to prove Zhao's lesbian identity, it would not affect the judgment of the court. Strangely, Zhao insisted that she "disagree[d] with the plaintiff's (Cui) demand for divorce."<sup>37</sup> Zhao indicated that she and Cui had lived together for nearly two years, and the relationship between them had not yet been broken.

In the case above, the court maintained that the relationship between Cui and Zhao was broken, yet the outcome was completely different in *Wang Li vs. Liu Yi* (2016).<sup>38</sup> Wang and her husband Liu were married in 2012. Both Wang and Liu are on their second marriage. After remarrying, they did not have a child of their own, but initially their relationship has no problem. However, Wang said that in 2014, as the

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<sup>37</sup> "Cui vs. Zhao Divorce Dispute First Trial Civil Judgement." *Wenshu.Court.Gov.Cn*.

<sup>38</sup> "Wang Li su Liu Yi Lihun Jiufen [Wang Li vs. Liu Yi Civil Dispute Divorce Case — Case from PKU Law]". 2016. *Pkulaw.Cn*

workload of her job increased, she had to spend more time dealing with important business partners. Liu suspected that Wang was having affair and began to follow her. They began to quarrel frequently, and Liu even went Wang's workplace to "damage her reputation."<sup>39</sup> Wang said that she hoped that in divorcing Liu the mutual property would be divided evenly. However, Liu disagreed with the divorce, stating that he and Wang "ha[d] always had a very good relationship before and after marriage; they share[d] joys and sorrows." He even offered a "second chance" after discovering his wife was having an affair. The court ruled that Wang and Liu had an "emotional basis"<sup>40</sup> and the relationship between them was not entirely broken. The court did not rule in favor of the divorce requested by Wang and rejected her claims.

Although both cases display husbands of lesbians (*tongfu*) discovering their wife's sexual identity post-nuptials, both cases incorporated one of the spouses who did not think that the relationship was broken even though the court gave a completely different judgment. In *Wang vs. Liu*, there was no evidence that Wang exhibited lesbian behavior. Does this mean it is more difficult to provide evidence conducting lesbian behavior over gay behavior? Or perhaps is it more difficult to obtain relevant evidence between lesbian relationships? Yu mentions another case of *tongfu* in his paper: *Yang vs. Long*.<sup>41</sup> Yang realized his wife, Long, often went to stay with a friend, Li, (female) quite often during their marriage. He soon discovered that Long and Li were actually in a cohabiting relationship with each other. After this discovery, Yang wanted to divorce

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<sup>39</sup> "Wang Li su Liu Yi Lihun Jiufen [Wang Li vs. Liu Yi Civil Dispute Divorce Case — Case from PKU Law]". 2016.

<sup>40</sup> Ibid.

<sup>41</sup> Yu, Qijia. "You Peiou Zhe yu Tongxing Tongju Falv Wenti Yanjiu [A Married person with same-sex cohabitation Legal Issues] pp. 11

Long and claim a 200,000-yuan (\$28,985) compensation for mental anguish. Long said that her bisexual orientation gradually developed during increased pressure from life and work after marriage. Long agreed to the divorce but refused to pay the compensation, stating that since she is cohabiting with a person of same-sex, she should not be compensated.<sup>42</sup>

Yu uses the case of Yang vs. Long to illustrate that the court's judgement was limited to the statute of law for compensation for mental damage. The laws and regulations did not have provisions for the compensation for divorce of *tongqi/tongfu* and could not protect *tongqi/tongfu* legitimate rights and interests. Another problem is the court could only make judgments according to the Marriage Law listing only four possible situations concerning whether a marriage was broken but could not judge same-sex cohabitation. Yu argued that if the law recognizes same-sex cohabitation in legislation, it could effectively prevent homosexuals from entering a fraudulent marriage under social and family pressure and causing harm to *tongqi/tongfu*. I do not endorse the proposed solution, mainly because he did not discuss how the law should guarantee the rights for same-sex partners after recognizing same-sex cohabitation. Meanwhile, Yu also assumed that the recognition of same-sex cohabitation will prevent homosexuals from entering heterosexual marriage, which is not necessarily the case.

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<sup>42</sup> "Interpretation No. I Of The Supreme People's Court On Several Issues In The Application Of Marriage Law Of The People's Republic Of China." Article 12. Both husband and wife shall have the duty to practice family planning. On December 25th, 2001, the Interpretation No.1 of the Supreme People's Court on Several Issues in the Application of Marriage Law of the People's Republic of China (the Interpretation, hereafter) was promulgated. Article 2 provides further explanation to the 1980 Marriage Law in regards to the specific situation "a person who has a spouse but co-habits with another person," Article 2 The circumstance that "a person who has a spouse but co-habits with another person" as mentioned in Articles 3, 32 and 46 refers to a person who has a spouse continuously live, not in the name of husband and wife, together with any person of the opposite sex other than his (her) spouse.

At present, it can be seen from the case of *Yang vs. Long* that same-sex cohabitation cannot be considered as a violation of the Marriage Law, which lists “cohabitation with others” as one of the violations, but same-sex cohabitation does not constitute as “others.” In this case, homosexuals do not have to legally bear compensation for mental damages. However, once same-sex cohabitation and heterosexual cohabitation is viewed as similar in legal terminology, same-sex cohabitation will also have the same rights as heterosexual cohabitation; same-sex cohabitation should not solely be addressed when homosexuals need to be punished yet ignored when properly and comes to rights and protections. The premise that same-sex cohabitation can enjoy the same legal protection as heterosexual cohabitation is that Chinese lawmaking no longer considers homosexuality to be at fault. At present, the attitude towards homosexuality is still exclusive both socially and legally. It can be seen from the disgrace of *tongqi/tongfu* in their statements, who are unwilling to be deceived, but more important, who felt ashamed by once being married to a homosexual. Therefore, before advocating for the recognition of same-sex cohabitation, it is necessary to first support the decriminalization of homosexuality; it is only possible to further advance gays and lesbians’ rights and legislation when homosexuality is a neutral concept.

### **Judgment Based on Violation of Other Legal Provisions (Disease, Violence, Threat)**

The overarching theme in all the following cases is that even though one party is clearly identified and confirmed as a homosexual, the court's decision was based solely on the violation of other legal provisions, such as violating the Marriage Law by committing domestic violence or violating the General Principles of Civil Law by threatening or

physically abusing the others. In the judgment, one party is usually referred to as a homosexual when the violation of a legal clause is announced. In this case, stating one party's sexual identity as a contributing factor to overall fault but not the other is worth pondering, especially since both parties have violated the law. The judgments of these legal provisions provide evidence that homosexuals are purposefully alienated in the legal realm and that *tongqi/tongfu* believe homosexuality is a punishable offense by their witness statements. Therefore, homosexual should be considered as a neutral term in legal legislation and legal jurisdiction, rather than written along with other violations without proper legal grounds.

Civil Judgment of the Second Instance of the Divorce Dispute: *Yang vs. Wu* (2014)<sup>43</sup>

Yang and her husband, Wu, met in early 2011. Legally married in July of that same year, they held the wedding ceremony in November and had no children. After the wedding, Yang suspected that Wu was not only gay, but also carries sexually transmitted diseases based on his medical history.<sup>44</sup> As a result, increasing disputes arose between Yang and Wu, which caused them to eventually live separately in 2013 for nearly a month. Wu stated that, in the aftermath of a particularly heated conflict, Yang forcefully entered his workplace to take possession of finances without his permission. Soon after, Yang filed a lawsuit requesting the dissolution of the marriage, an equal split of the common property, and mental damage compensation of 50,000 yuan. Wu agreed to divorce. After the court

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<sup>43</sup> China Judgement Online. 2014. "Yang vs. Wu Divorce Dispute Second Trial Civil Judgement." *Wenshu.Court.Gov.Cn*.

<sup>44</sup> Decision Of The Standing Committee Of The National People's Congress On Amending The Marriage Law Of The People's Republic Of China." Article 6. No marriage may be contracted under any of the following circumstances:(1) if the man and the woman are lineal relatives by blood, or collateral relatives by blood up to the third degree of kinship; or (2) if the man or the woman is suffering from leprosy, a cure not having been effected, or from any other disease which is regarded by medical science as rendering a person unfit for marriage.

investigation during the first trial, it was determined that Yang's suspicion of Wu's homosexual identity and sexually transmitted diseases were the primary triggers of the impending divorce. Since the relationship between the couple is broken, the first trial grants Yang a divorce.

Yang was dissatisfied with the verdict not granting equal property division and mental damage compensation during the first trial. Yang thinks Wu's gay identity makes himself at fault, so she appealed a second trial with relevant evidence of Wu's homosexuality, infertility (which makes them not able to have kids), and medical appointments for sexually transmitted diseases; she states that his sexual identity was a "key factor" in the collapse of the marriage. Furthermore, she had evidence of long-term domestic violence and illegitimate house arrest. In an effort to keep her "trapped" in the marriage, Wu hid important personal belongings and all copies of the marriage documents, infringing on Yang's privacy. Moreover, Yang claimed Wu went to her working place and damaging her reputation. All these factors together eventually lead to the rupture of marriage. Wu should not share any property because he is the one at fault. Yang regards the judgement made in the first-trial is incorrect by stating that the reason lead to the rupture of the marriage was that Yang suspected that Wu is gay and carries sexually transmitted diseases... The statement should be corrected by adding the factors described above, including domestic violence and infringe privacy. In this regard, the court of second trial held that the first trial judgment is applied improperly. According to Article 46 of the Marriage Law of the People's Republic of China, Wu should compensate Yang 50,000 yuan (\$7,246) for the physical and mental damage he caused.

In Yang's two lawsuits against Wu, Yang repeatedly emphasized that Wu is gay and carried sexually transmitted diseases, infertility and other diseases (Yang did not specify what kind of diseases). Even though Yang presented medical evidence during the retrial that could prove Wu carries certain diseases, the court did not rule that Yang should have more property because she failed to provide valid evidence to prove that she was at no fault in this marriage. The statement about Wu's homosexuality and illness appeared in Yang's complaint twice, showing her emphatic belief that he is truly at fault. To complicate matters, the retrial judgment amended the original trial's judgment to include his sexually transmitted diseases as cause for marriage breakdown. The second trial considered Wu's violence and abuse and invasion of privacy on the basis of the first-trial judgment. They ruled domestic violence, and the hiding of documents and personal items as leading to the breakdown of the marriage. In the case of Yang's reaffirmation and provision of Wu's proof of homosexuality, the second-trial judgment was amended on the basis of the first-trial judgment.<sup>45</sup> According to the second-trial judgment, Yang actually suffered physical and mental damage because of Wu's homosexual orientation and long-term domestic violence, and thus required compensation of 50,000 yuan (\$7,246).<sup>46</sup>

The legal reasoning behind *Yang vs. Wu* indicates that 'fault divorce' is often found based on the violation of the four conditions listed in Article 46 of the Marriage Law. In this case, the court is acting quite reasonably in not considering the sexual

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<sup>45</sup> Article 46 of the Marriage Law of the People's Republic of China, if the divorce is caused under the four conditions stipulated by the Marriage Law, the no-fault party has the right to request compensation in the case of: 1. bigamy 2. spouse cohabiting with others 3. domestic violence 4. Abuse and abandonment of family members.

<sup>46</sup> "Yang vs. Wu Divorce Dispute Second Trial Civil Judgement." 2014

orientation of Wu, rather focus on Wu's abusive behavior; it is often the spouses who feel injured by their fraudulent husbands or wives want the court to punish them, and hope to be compensated through their emphasis on the other party's homosexuality. It is worth pondering why Wu's homosexuality played into the need to pay compensation, which is also explicitly mentioned in the judgment. Compared with the previously mentioned case, *Zhang vs. Yang* (2016), even if Yang was judged to have homosexual behavior, he was not demanded to pay mental damage compensation. Therefore, in fact, *Yang vs. Wu* proves that it is Wu's violation of the Marriage Law that made him a faulty party. As a homosexual person with sexually transmitted diseases, Yang might not be able to make Wu a faulty party (evidenced in the first-trial judgment). Outside of sexual orientation, domestic violence is illegal because it violates the law; the difference in these cases is that the judgment will state homosexuality in addition to domestic violence whereas heterosexuality is rarely emphasized. It has been proven that the homosexual orientation is still undesirable in the legal realm, yet these tendencies do not grant spouses the compensation they request for mental anguish unless other violations of the marriage law exist.

Civil Judgment of the Second Trial of Property Disputes after the Divorce: *Ye vs. Lin*

(2014)<sup>47</sup>:

The actual date that Ye and her husband, Lin, were married is not documented, but they did eventually give birth to twin daughters through an intravenous fertilization (IVF) procedure. In 2012, Ye and Lin signed a Divorce Agreement, which listed the distribution

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<sup>47</sup> China Judgement Online. 2014. "Ye vs. Lin Post-Nuptial Property Dispute Second Trial Civil Judgement." *Wenshu.Court.Gov.Cn*.

of property and debts (in which Lin received more property)<sup>48</sup> and processed the divorce procedure that same day. During the trial, Lin admitted saying that he would perform a murder-suicide with their two daughters if his wife did not agree to divorce.<sup>49</sup> Because of this threat, Ye believed that the signed divorce agreement was unfairly coerced. The 10,000-yuan sum for which she is suing her ex-husband is for mental damages that ensued during their relationship. Ye provided recordings and social media chat records in order to prove that Lin is a homosexual. Lin said that he had "a little bit of (gay) inclination"<sup>50</sup> but did not acknowledge that he is gay. Ye claimed that before the wedding, she did not know about Lin's homosexual behavior until after their daughter was born.

Considering her family's stability and how a divorce might affect her two daughters, Ye wanted to preserve the family even though her husband disagreed. Because of Lin's threat of harming the children, a divorce agreement was signed between the parties. Ye said that during her pregnancy, Lin cohabited with his boyfriend (which in Ye's viewpoint makes Lin at fault) and hoped that the court would revoke the unfair distribution of property listed in the divorce agreement. Lin argued, however, that there was not effective evidence to prove that he is gay and did not agree to pay for mental damage compensation. When the court addressed the mental damage compensation, it used Article 46 of the Marriage Law to show that, because Lin did not have the behavior indicated in the Marriage Law, he should not be considered at fault. The court did not

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<sup>48</sup> Including A House values 2,716,160 yuan (\$393,646). A car values 330,000 yuan (\$47,826). Six Air Conditioner, Bath Tube, Kitchenware. Two other loaned vehicles.

<sup>49</sup> "Ye vs. Lin Post-Nuptial Property Dispute Second Trial Civil Judgement." 2014

<sup>50</sup> Ibid.

support Ye's demand for compensation, but they did support the claim that the divorce agreement was coerced and allowed amending the terms of the agreement.

In this case, the purpose of the court was mainly to determine if coercive behavior was a factor in the divorce agreement.<sup>51</sup> However, at the conclusion of the first trial, Lin's threat of "killing [their] two daughters [before] commit[ting] suicide" and acknowledging that he has "a little bit of (gay) inclination" was enough evidence for both mental and physical harm to wife, who deserved marital happiness. The judgement stated that Lin's homosexual orientation was a contributing factor that added to his coercive behavior against Ye, even though the major concern of the case was his use of threatening language. The judgment of the final trial did not mention Lin's "little bit of (gay) tendency" but only regarded Lin's statement about "killing two daughters and committing suicide" as the cause of psychological trauma. Actually, Lin having a "slightly (gay) tendency" would not affect the court decision, since his statement to kill the daughter was the key issue in proving his violation of the Civic Law. The court's amendment to the terms of the divorce agreement and the handling of Ye's claims was not affected by the husband's sexual orientation.

Special Case: Wang vs. Li (2012)<sup>52</sup>

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<sup>51</sup> Supreme People's Court. 1988. "Notice Of The Supreme People's Court On Issuing The Opinions On Several Issues Concerning The Implementation Of The General Principles Of The Civil Law Of The People's Republic Of China (For Trial Implementation)." 最高人民法院关于贯彻执行<中华人民共和国民法通则>若干问题的意见(试行)》第69条 "以给公民及其亲友的生命健康、荣誉、名誉、财产等造成损失或者以给法人的荣誉、名誉、财产等造成损害为要挟, 迫使对方做出违背真实的意思表示的, 可以认定为胁迫行为。" [http://www.npc.gov.cn/huiyi/lfzt/swmsgxflsyf/2010-08/18/content\\_1588353.htm](http://www.npc.gov.cn/huiyi/lfzt/swmsgxflsyf/2010-08/18/content_1588353.htm)

<sup>52</sup> "The Plaintiff Wang Accuse The Defendant Li Divorce Dispute First Trial Civil Judgement." 2015.

In these 40 cases, I found an interesting case of *tongfu*. Wang and Li were registered as married in 2003 and had a seven-year-old son. Wang claims during the time they worked in Beijing, his wife, Li, was attracted to her female coworker, Pan Jinhua (female). Since 2006, the couple had been living separately for one year, mainly due to disagreements about how to raise their son. Wang requested a divorce and custody of their son, as well as child support equaling 26,400 yuan. Li denied allegations of having an extramarital relationship with another female, stating that the story was embarrassing and filthy. Alternatively, she accused her husband of having an affair with Jia (female). Li hoped to reconcile, but if Wang insisted on divorce, Li wanted the child, a child support fee of 92,400 yuan, as well as 100,000 yuan for mental damage compensation. The court ruled neither in favor of the divorce, nor the child support payments.

Through this case, under the condition that not all parties identified themselves as homosexuals, the scholars could not directly assume their sexual identity because there is a possibility that one party either has deliberately or unassumingly claimed their spouse is gay in order to get a positive ruling. Pseudo- “fraudulent marriages” are referred to as a spouse accusing their partner of being a homosexual based on skewed evidence (often born from distrust) when it is, in fact, not true. Moreover, due to the fluidity of sexual orientation, it is impossible to determine without a doubt a person’s sexual attraction at all times in their life. That being said, adhering to a definition of “homosexuality” is a very complicated process.

## **Conclusion**

My goal is not to argue whether the law should define homosexuality, but rather to make two points through this series of real cases: 1. The current laws and regulations neither protect the interests of *tongqi/tongfu*, nor does it serve in the interests of homosexuals. 2. Fraudulent marriages not only harms *tongqi/tongfu*, but also misleads homosexuals into this form of marriage (because they would think it is a good cover-up and is a good option for them without causing any harm). Unless homosexuals feel severe legal consequences for entering into fraudulent marriages, they will continue to choose this as a way to hide their sexual orientation, appease their families, and cope with social pressure; what they do not expect is that it also has the potential for serious long-term consequences that create further prejudice against the queer community. In this way, homosexuals can become complacent with these fraudulent marriages rather than pursuing marriage equality. Both the Chinese society and homosexuals lose. In order to rectify this problem, the social oppression of homosexuals in China needs to be lifted in order to change this alienation of queer people into a perspective where all citizens have a collective, mutually engaging goal to eradicate prejudice, and therefore, fraudulent marriages.

The culture is shifting among the younger generation, who are increasingly aware of their choices when facing marriage. Gradually, gays and lesbians may consider entering “cooperative marriage”, a form of open marriage based on consensual and written documentation stating the rules inside marriage. However, the problematic side of “cooperative marriage” become evident in recent years, especially on the issue of child custody.<sup>53</sup> Another option available for gays and lesbians is to stay single, living with

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<sup>53</sup> China Judgement Online. 2017. “Li vs. He Divorce Dispute Second Trial Civil Judgement.” *Wenshu.Court.Gov.Cn*

“friends” until same-sex marriage is approved in China. These two options may not be the best solution, but fraudulent marriages will certainly bring the worst consequences to the society. Introducing no-fault divorce may be the simplest and best solution in addressing the limitation of current legal situations, since it helps alleviate *tongqi/tongfu*'s pressure in finding proves, protects interests of both parties, and provides legal grounds for the court judgements. Nevertheless, this paper is only able to speak for the two parties involve in fraudulent marriages, not the families of both sides or the society in general. Although to determine who is at fault to whom falls out of the scope of this paper, it is better to solve problems harmoniously instead of stick to blame the others.

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