

Straightjacket

Same-Sex Orientation Under Chinese Family Law:
Marriage, Parenthood, Eldercare

PROEFSCHRIFT

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SUMMARY

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

This PhD thesis gives a panorama of both the official laws and the informal social norms that influence the family life of same-sex-oriented persons in mainland China. It pivots around three important imperatives in the 'normal' trajectory of family life: getting married, giving birth and securing eldercare. It asks how Chinese same-sex-oriented people follow and/or resist this path, and in this process, how they interact with Family Law in its pluralist sense.

This thesis covers a wide range of socio-legal issues that are directly or implicitly influencing one's family life. It discusses de/criminalization (the change of the crime of hooliganism), de/pathologization (conversion therapy and the objection thereof), homosexual representations (such as trademarks and films), same-sex weddings, the distribution of communal property of same-sex cohabitants, custody in divorce cases, official and de facto adoption, fostering, in vitro fertilization conducted by lesbian couples, transnational surrogacy by gay couples, inheritance between same-sex partners, medical decision in emergency, same-sex marriage campaigning, old-age planning, coming out to parents, etc. It also documents how ordinary people, lawyers and activists change the law via legislative proposals, impact litigation and transnational linkage.

Alongside detailed legal analysis, this thesis features vivid story-telling from eight months' anthropological fieldwork. The author conducted semi-structured interviews and informal conversations with more than 60 respondents. The story-tellers include same-sex couples of different generations, cooperatively married lesbians and gay men, 'cheating' husbands and unwitting wives in mixed-orientation marriages, parents of lesbian and gay adult children, friendly lawyers, LGBT activists and so on. Together they show the tensions between the global LGBT rights discourse and the lived experiences of Chinese same-sex-oriented persons with or without a gay identity.

Straightjacket offers an epistemology that avoids the binary of closeting and coming out. While acknowledging the uncomfortable restriction of the heteronormative imperatives, this research also recognizes the seductive socio-legal benefits for the 'family outlaws' to follow suit. Accordingly, it questions the encouragement of coming-out and the condemnation of non-disclosure often seen in LGBT movements. It also endorses a beyond-marriage approach of legal reform, which unpacks the rights attached to marriage, so that the law can protect not only same-sex couples but also a wider range of relationships worth valuing.

This research incorporates legal doctrinal research, ethnography, queer theory, gender studies and post-colonial theory. It dialogues with legal consciousness doctrine, namely, ordinary people's actions 'before', 'with' and 'against' the law; it reflects on the research ethics of conducting fieldwork on sensitive topics; it complicates the anti-normative ethos in queer theory; it shows the not always harmonious relation between women's rights and gay rights, especially regarding marriage and reproduction. This study takes seriously both the empowering and the limiting effects of a globally popularizing LGBT rights discourse.

内容简介 (SUMMARY IN CHINESE)

《直线夹克：中国家庭法下的性倾向——关于婚姻、生育、养老的法人类学研究》

本博士论文梳理了中国大陆影响同性性倾向人群婚家抉择的法律。此处法律采广义，包括法律法规、政策规章、司法案例，以及不成文的社会规范。文章围绕着“结婚、生子、养老”这一“直线”人生轨迹，探讨法律如何向同性性倾向人群施加压力，又如何提供各种便利吸引其进入异性婚家。本文涵盖大量与同性恋及婚姻家庭相关的议题，包括鸡奸除罪化、同性恋去病化、同性婚礼、离婚财产分割、抚养权争议、收养、寄养、人工生殖、代孕、遗产继承、紧急医疗决定、同性婚姻、国际倡导等，作者对其进行了详尽的法教义学和法社会学分析（第二至五章）。本文也记录了律师和活动家如何通过影响力诉讼等手段为同性恋者争取权益（第六章）。

作者经过八个月的田野调查，对六十余位受访者进行了半结构式访谈，同时对线上和线下同志社群活动进行了参与式观察。研究对象包括同性伴侣、有意向或已经进入形式互助婚姻中的男女同性恋者、“骗婚男同”、“同妻”、“同夫”、同性恋亲友会家长、彩虹律师、同性恋权益活动家等。受访者的年龄、性别、社会经济地位、婚恋状态及生活方式呈现出巨大差异，从中我们得以窥见在快速变化的当代中国，婚姻家庭领域如何呈现出中西文化和新老代际之张力。

本文英文标题 *Straightjacket* 有双关意涵，一为紧身衣，一为“直人”扮相（即异性恋的婚家轨迹）。该词的灵感来自一位访谈对象：“婚姻就像遮羞布；既然为父母面子形了婚，干脆生个孩子，把整套衣服穿上得了。”许多受访者都对异性婚姻及其附带的法律利益和社会认可抱此实用主义态度，而非仅仅控诉婚家对同性恋的捆绑。这种对婚家制度爱恨纠缠的矛盾情感，用既束缚又舒服的“夹克/假壳”来描述，比起把出柜/伪装、压迫/反抗、进步/传统对立起来的暗柜认识论，更符合当今中国多元价值冲撞的现实。

此番纠缠和冲撞在“同妻”现象中尤为凸显，作者在第三四章透过深度访谈和庭审参与式观察，对大众话语中的“骗婚”和“骗子宫”进行了更细致的思辨。第五章的农村老年“拉拉”的故事和亲友会家长的讲述，看似与“同妻”无关，却都涉及同一主题，即，同性恋这一标签和全球迅速扩张的同志权益话语对此前并无“同性恋”身份认同的人群的生活和价值观产生了激烈震荡。在结论章，作者重新探讨了隐瞒和坦诚的伦理，以及超越婚姻、超越身份政治的婚姻家庭法律变革的可能性。

本研究试图打破学科之间的藩篱，采法教义学、民族志、酷儿理论、性别研究和后殖民理论各家之长，并尽可能以通俗易懂的语言让不同学科背景的读者有所共鸣。本文的理论抱负不仅仅是为西方的研究增添一些案例，或者强调中国的特殊性，而是希望参与到普世性的竞逐，而这也是作者未来研究投入的方向。

SAMENVATTING (SUMMARY IN DUTCH)

Straightjacket: Gelijkgeslachtelijke Gerichtheid onder het Chinese Familierecht – Huwelijk, Ouderschap, Zorg voor de Oude Dag

Dit proefschrift biedt een panorama van zowel officiële wetten als informele normen in China die van invloed zijn op het familieleven van mensen die zich aangetrokken voelen tot hetzelfde geslacht. Het draait om drie belangrijke imperatieven in de ‘normale’ Chinese familielevensloop: trouwen, kinderen krijgen, en zorgen voor de oude dag. Het stelt de vraag hoe gelijkgeslachtelijk gerichte mensen in China dit pad volgen of weerstaan, en hoe zij daarbij omgaan met de vele lagen van het familierecht.

Het onderzoek bestrijkt een breed scala aan juridische/sociale kwesties, zoals de/criminalisering (de veranderingen in het misdrijf *hooliganism*), de/pathologisering (conversie-therapie en de verwerping daarvan), verbeeldingen van homoseksuele gerichtheid (zoals in handelsmerken en in films), bruiloften van twee vrouwen of twee mannen, verdeling van gemeenschappelijke bezittingen van samenwoners van hetzelfde geslacht, voogdij bij echtscheiding, officiële en feitelijke adoptie, pleegzorg, *in vitro* fertilisatie bij lesbische stellen, transnationaal draagmoederschap ten behoeve van homostellen, nalatenschap tussen partners van gelijk geslacht, medische beslissingen in noodgevallen, activisme voor het ‘homohuwelijk’, plannen maken voor de oude dag, uit-de-kast komen bij je ouders, enzovoort. Het proefschrift documenteert bovendien hoe gewone mensen, juristen, en activisten het recht veranderen door middel van proefprocessen, voorstellen voor wetgeving, en transnationaal activisme.

Naast een gedetailleerde juridische analyse, biedt dit proefschrift levendige verhalen gebaseerd op acht maanden antropologisch veldwerk. De auteur heeft semi-gestructureerde interviews en informele gesprekken gevoerd met meer dan 60 respondenten: koppels van hetzelfde geslacht (uit verschillende generaties), coöperatief met elkaar getrouwde lesbiënnes en homomannen, ‘bedriegende’ en ‘niets vermoedende’ echtgenoten van verschillende gerichtheid in ‘gemengde’-huwelijken, ouders van volwassen homoseksuele kinderen, homovriendelijke juristen, *LGBT* activisten, enzovoort. Bij elkaar laten zij spanningen zien tussen het wereldwijde discours over *LGBT rights* enerzijds, en de geleefde ervaringen van gelijkgeslachtelijk gerichte mensen met of zonder een homo- of lesbische identiteit in China anderzijds.

Onder de titel *Straightjacket* (keurslijf, dwangbuis), biedt dit proefschrift een epistemologie die het binaire concept van in en uit de kast vermijdt. Hoewel het onderzoek de knellende beperking door de hetero-normatieve imperatieven serieus neemt, erkent het tegelijkertijd hoe verleidelijke juridische en maatschappelijke voordelen het hetero-keurslijf aantrekkelijk maken voor *family outlaws*. Van daaruit stelt het vragen bij het aanmoedigen van uit-de-kast komen en bij het afkeuren van er-niet-mee-voor-de-dag komen, zoals vaak te zien in *LGBT* bewegingen. Wat juridische hervormingen betreft, pleit deze studie voor een benadering ‘voorbij’ het (homo)huwelijk, een benadering die de rechtsgevolgen van het huwelijk loskoppelt van het gehuwd zijn, zodat niet alleen gelijkgeslachtelijke paren worden beschermd maar ook een

ruimer scala aan waardevolle relatievormen.

Dit proefschrift combineert juridisch onderzoek, etnografie, *queer theory*, *gender studies* en postkoloniale theorie. Het gaat in gesprek met de theorie van *legal consciousness* die menselijke handelingen beschrijft in termen van 'voor', 'met' en 'tegen' het recht; het reflecteert op onderzoeksethiek bij veldwerk over gevoelige onderwerpen; het compliceert het anti-normatieve ethos in *queer theory*; het toont de niet altijd harmonieuze relatie tussen vrouwenrechten en homorechten, in het bijzonder waar het gaat om huwelijk en voortplanting. Deze studie toont zich bewust van zowel de versterkende als de beperkende effecten van een wereldwijd populariserend discours over *LGBT rights*.

CURRICULUM VITAE

Jingshu Zhu did her PhD research at Leiden University in the Netherlands from March 2013 to February 2018. Her PhD thesis combines law and anthropology in examining how Chinese same-sex-oriented people deal with the socio-legal imperatives of getting married, becoming parents and securing eldercare in a normative family. This is the first doctoral thesis written in English on sexual orientation law in contemporary China; it is also the first thesis in this field funded by the China Scholarship Council.

She has published articles about sexual orientation law in English and Chinese in peer-reviewed academic journals. Her Chinese translation of the book *Covering: The Hidden Assault on Our Civil Rights* by Kenji Yoshino was well received. She is one of the two authors of *State-Sponsored Homophobia – A World Survey of Laws: Criminalisation, Protection and Recognition of Same-Sex Love* (2013 and 2014 editions), an influential annual report issued by the International Lesbian Gay Bisexual Trans and Intersex Association (ILGA). She is also a columnist at HelanOnline and LoveMatters, writing essays on hot topics in relation to gender and sexuality in China and the Netherlands.

After her law studies at the Beijing Institute of Technology, Zhu completed an Advanced LL.M. in Public International Law at Leiden Law School, where she worked as a research assistant for Professor Kees Waaldijk. Together they developed a dynamic visualization tool that shows the correlation between laws and attitudes regarding homosexuality in more than 90 countries, which has been presented at several international conferences from 2012 onwards. She has given guest lectures on sexual orientation law in contemporary China, at Leiden University and at the National Central University in Taiwan. She has also presented her work in academic conferences worldwide, including Stockholm, Bangkok, Geneva, Lisbon, Taipei, Beijing, Luxembourg, Amsterdam, Zalesie, and Mexico City. She was also an invited keynote speaker at the second Non-Monogamous and Contemporary Intimacies Conference in Vienna in 2017.

Beyond her academic interests, Zhu is actively involved in Chinese LGBT movements by providing legal consultation for local NGOs and participating in advocacy events. She has been hosting a popular sex-positive podcast since 2015, telling gender and sexuality stories with a critical mind.

PROPOSITIONS
relating to the dissertation

Straightjacket: *Same-sex orientation under Chinese family law – Marriage, parenthood, eldercare*


by Jingshu Zhu

1. The Chinese ideal family-life trajectory of entering into a different-sex marriage, giving birth and living one's old age under the care of one's offspring (*jiehun shengzi yanglao*) is a metaphorical 'straight-jacket'. It restrains numerous people regardless of sexual orientation in contemporary mainland China, while offering hard-to-resist warmth and decent cover.
2. In the absence of a same-sex marriage package, there are fruitful resources in existing Chinese law that can be used in favor of same-sex-oriented people, such as the 'related person' clause in the law on medical decision, and the broad interpretation of 'family' in some regional laws against domestic violence. Such a beyond-marriage approach will have a wider range of beneficiaries.


See Section 7.5. See also Nancy D Polikoff, *Beyond (Straight and Gay) Marriage: Valuing All Families under the Law* (Beacon Press, Boston, 2008).

3. (Sexual) minorities often face a double bind: compulsory hiding and compulsory confessing. Coming out challenges the former yet may reinforce the latter. Visibility and secrecy are both valuable tactics and should not be antagonized in LGBT movements.
4. Large numbers of same-sex-oriented people have entered into different-sex marriage, with or without disclosing their sexual orientation. The conflicts in those relationships (epitomized in the *tongqi* phenomenon), together with the burgeoning LGBT activism, are pushing Chinese authorities and laws to see homosexuality and speak about it.
5. The pluralist framework of Family Law 1, 2, 3, 4 is particularly helpful in studies of sexual orientation law. It integrates the statutes and cases that directly address family issues, and the broader scope of laws that influence one's family life, as well as unwritten social norms that shape people's imagination of family.

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

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6. The schemas provided by legal-consciousness scholarship, i.e., before, with and against the law, are helpful analytical tools to understanding ordinary (same-sex-oriented) people's dynamic relations to law. Future research needs to pay more attention to law's emotion-generating effects and the role of emotions in changing law.

See Section 1.3. See also Susan S Silbey and Patricia Ewick, *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press, Chicago, 1998).

7. China is not a 'case study' that simply serves to verify or falsify Western-originated gender/sexuality theories. Scholars working on non-Western realities should aim to theorize competing universalisms.
 8. The disciplinary boundaries between law, anthropology, cultural studies, post-colonial scholarship and social movement studies hinder our understanding of sexual orientation as lived experience.
 9. Meaningful relationships, in fieldwork and in private life, are often built on shared vulnerability and awkwardness.
 10. When in doubt, go work out.
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