

A Study on the Validity of Fraudulent Marriage from the Perspective of the Civil Code of the People's Republic of China — Take the Example of Concealing Sexual Orientation in Marriage

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Abstract: Concealing sexual orientation in marriage has a long history, most of which involves fraud and is accompanied by violence and sexually transmitted diseases. If one party conceals his sexual orientation and enters into marriage with the other party, it belongs to fraud in the sense of civil law, and the law should give his spouse the right to annul marriage. However, China's Marriage Law does not regulate fraudulent marriage, but under the Civil Code system, the provisions on revocable marriage in the Marriage and Family Code are not closed, that is, the validity of marriage is not limited to the legal provisions defined in the Code, and spouses can cancel the fraudulent marriage according to relevant legal provisions.

Keywords: Fraud; Marriage; Concealing Sexual Orientation; Voidable Marriage

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1. Introduction

Although China's Health Department has long removed homosexuality from the list of mental illnesses, homosexuality remains a relatively obscure topic today due to traditional social beliefs. In order to protect their social reputation and meet their own reproductive needs, some homosexuals conceal their sexual orientation and choose to marry heterosexuals. Most of these are patterns of homosexual men marrying heterosexual women, the latter known as wives of gay men^[1]. According to a survey statistics, the number of wives in China is at least 23 million. The wives are faced with the reality that they cannot exercise their wife's rights and their health rights are violated. Their living environment after marriage is worrying^[2]. In seemingly legal relationships, the partner whose sexual orientation is concealed and deceived is forced into an unequal and unfree marriage from the beginning, and is more likely to suffer repeated violations of his or her legal rights in future relationships^[3]. On the one hand, gay husbands tend to transfer their negative emotions to their wives, causing them to suffer in cold and hot violence. On the other hand, when the wife learns her husband's true sexual orientation, the sense of difference in marriage life and the sense of helplessness cheated by her husband cause mental pain that ordinary people cannot understand. Concealing sexual orientation in marriage is not only immoral, but also has certain actual violations^[4]. Some argue that when a wife finds out that her husband has concealed his sexual orientation from her, making the marriage untenable, she has the right to choose to divorce directly without having to go through other procedures. This is reasonable

for married couples living together, even couples with children. However, it is not only unfair but also not necessarily logical for women who are not married or who remain virgins for many years after marriage. Because society characterizes this segment of women as divorced, unmarried and divorced obviously have completely different social valuations of women. Besides, divorce itself is not easy for a wife.

According to some survey data, nearly nine in 10 gay husbands do not intend to divorce, while fewer than one in 10 women intend to stay married, which means it is difficult to negotiate a divorce^[4]. Article 1079 of China's Civil Code clearly stipulates five legal circumstances under which a couple's "feelings have indeed broken down" in divorce proceedings, namely: bigamy or cohabitation with another person; domestic violence or abuse or abandonment of family members; gambling, drug abuse and other bad habits that persist despite repeated education; separation for two years due to emotional discord; and other circumstances that lead to the breakdown of feelings between husband and wife. China does not currently recognize same-sex marriage, and bigamy is not applicable. According to judicial interpretation, a spouse who cohabits with another person refers to the opposite sex, so even if one of the spouses cohabits with the same sex for a long time, the other party cannot file a divorce lawsuit to the court on the grounds of the first situation. The second, third and fourth situations in this article are all general situations, and the author will not discuss them here. In addition, the fifth case as a bottom clause, judges enjoy greater discretion. All this shows that even in the case of divorce by litigation, divorce by litigation on the grounds that one of the spouses is homosexual does not fall into any of the five cases provided for by law, and the substantive provisions of paragraph 5 are unclear, which leads to different criteria for courts to decide whether homosexuality of one of the spouses leads to marital breakdown, and evidence and authentication issues often make it difficult for courts to make decisions^[5].

With the development of China society, this phenomenon has been paid more and more attention. Under the civil code system, there are the following questions about the act of concealing sexual orientation in the above-mentioned marriage: Does the act of concealing sexual orientation in marriage constitute fraud? If so, can the spouse request the annulment of the marriage in accordance with the relevant legal provisions? Based on this, the author will analyze the effect of fraudulent marriage from the perspective of China Civil Code from the following angles, in order to provide reference for judicial practice in China.

2. Concealing Sexual Orientation in Marriage Constitutes Fraud

China's Civil Code stipulates that voluntary marriage and marriage registration are two necessary conditions for concluding marriage^[6-7]. Marriage with concealed sexual orientation apparently meets these two necessary conditions for marriage. However, after careful study, it is not difficult to find that marriage with concealed sexual orientation contradicts the necessary conditions for marriage and has defects in expressing the true intentions of the concealed party, because if the concealed party knows that his spouse is homosexual, it is usually impossible to enter into marriage with him voluntarily. Unlike other fraudulent marriages, concealment of sexual orientation in marriage is directly related to the establishment of marriage and therefore much more serious than other fraudulent marriages^[8-9]. Concealing sexual orientation in marriage as a fraud includes the following three aspects:

First, spouses have the right to know each other's sexual orientation. Since ancient China, marriage, as a turning point in an individual's life, is not only related to the two parties themselves and their respective social networks, but also closely related to the growth and development of their offspring. Sexual orientation to a certain extent determines whether a person can communicate with the opposite sex normally, as well as marriage, children, and living together. Thus, both spouses have a legal right to know the sexual orientation of the other, which is an important prerequisite for determining the validity of their marriage and a key factor in excluding concealment of sexual orientation from the reservation of intent^[10]. If one partner knowingly conceals or refuses to inform the other of his or her true sexual orientation and enters into marriage with the other party, this will seriously harm the personal rights of the bona fide counterpart. In addition, homosexuals are often at high risk of contracting diseases such as AIDS, and spouses should therefore be given the right to know each other's sexual orientation from an individual's perspective, as this source of risk may put their quality of life, physical health and even life at risk. At the same time, the exercise of this right to information does not violate the individual's right to privacy protection,

because a party's right to information about sexual orientation has a direct and far-reaching impact on the realization of his or her spouse's rights, including but not limited to the core rights of life, body and health. Moreover, the exercise of the right to know by both spouses is not unlimited, but must be exercised according to the principle of proportionality, that is, under the premise of conforming to legitimate purposes and necessary means, one party must not cause unnecessary damage to the other party because of the exercise of this right, otherwise, this behavior may constitute infringement^[11]. For example, a wife who openly claims that her husband is gay and makes his private life public, especially when it comes to sensitive topics such as sexual orientation, will undoubtedly cause distress and harm to his life. This act may not only violate the husband's right to privacy and reputation, but may also entail civil or criminal liability if it leads to serious consequences, such as damage to his physical and mental health or breakdown of social relations.

Second, the spouse intentionally conceals his or her sexual orientation. For intent to be established, one of the spouses must first be clearly aware of his or her sexual orientation at the time of marriage. In China's judicial practice, it cannot be regarded as intentional to conceal one's true sexual orientation from one's spouse if one is not completely sure of one's sexual orientation or gradually realizes one's true sexual orientation after marriage. Second, there is subjective malice, that is, one spouse knows that he is gay and cannot have a normal marriage life with the opposite sex, and can fully predict that the other party will suffer great mental pain after marriage, but still deliberately conceal his true sexual orientation and marry him^[12-13]. In real life, some heterosexual married homosexuals live normally with their spouses and participate in the management of common marital affairs, although they conceal their true sexual orientation, but they do not have subjective malice. Because in the current social and cultural context, homosexuals may suffer discrimination, rejection and even violence, they choose to hide their sexual orientation, perhaps to avoid unnecessary trouble and harm to themselves and their families. Moreover, after marriage, they really strive to overcome their physical and mental obstacles in married life, which does not constitute fraud. If the spouse subsequently learns that the marriage is difficult to maintain, the marriage can only be dissolved by divorce.

Third, the spouse falls into cognitive error and marries it. Whether it is concealing a serious illness or sexual orientation, the ultimate goal of the parties is to enter into marriage. The wrong understanding of spouse's sexual orientation belongs to the essential error of marriage. It is generally believed that the essence of marriage is that both husband and wife safeguard common interests, live together, help each other and support each other. At the same time, errors in social status, property, identity, personality, chastity, conduct, etc. are not essential errors in marriage, so neither party can ask for annulment of marriage. Whether it belongs to the essential error of marriage must be judged reasonably according to the general social concept. Obviously, a normal heterosexual would not marry a homosexual without fraud, coercion, or seduction.

3. Fraudulent Marriage with Concealed Sexual Orientation Constitutes Voidable Marriage

According to the general principles of civil law in China, fraudulent civil acts can be revoked. However, in the field of marriage and family, it is not completely consistent, otherwise most marriages can be annulled. China's Civil Code on Marriage and Family stipulates that coercion and concealment of serious diseases are legal conditions for annulling marriage relations. As to whether fraudulent acts of concealing sexual orientation in marriage can be used as grounds for annulling marriage relations, if there is a correct understanding of the system of marriage validity, it is not difficult to find relevant legal solutions in China's Civil Code.

3.1 Marriage Validity System under China's Civil Code

The valid marriage system in China's Civil Code inherits the dual system in China's Marriage Law, which clearly stipulates invalid marriage and revocable marriage. However, the legislator, taking into account the stability of marital and family relations, limited to some extent the circumstances that might affect the validity of marriage. Such as major misunderstandings and obvious unfairness, etc., do not affect the validity of the marriage relationship. Although this legislative mechanism is realistic and logical, it also causes the imbalance between the validity of marriage and that of ordinary civil legal acts to a certain extent.

However, the reincorporation of marriage and family law into China's Civil Code indicates that marriage and family law in China's Civil Code system must be related to different parts of China's Civil Code in terms of legal logic. Otherwise,

the codification of the civil law system would inevitably be reduced to the codification of seven laws. It is on this basis that the marriage validity system in China's Civil Code shows different characteristics from the application period of China's Marriage Law. In particular, if we want to correctly understand the validity system of marriage under China's Civil Code, we must correctly grasp the following two points:

First, according to Article 1051 of China's Civil Code, invalid marriage includes three types of circumstances: bigamy, kinship that prohibits marriage, and underage marriage. In addition, according to the provisions of Paragraph 1 of Article 17 of the Interpretation of the Supreme People's Court on the Application of Marriage and Family Part of the Civil Code of the People's Republic of China (hereinafter referred to as Judicial Interpretation I of Marriage and Family Part), invalid marriage is limited to the three circumstances specified in Article 1051 of the Civil Code, and the parties concerned shall not claim that the marriage is invalid for any reason other than this circumstance. However, the specific rules governing annulable marriages are different from those governing invalid marriages: on the one hand, Articles 1052 and 1053 of China's Civil Code do not use the restrictive phrase "one of the following circumstances" as in Article 1051, but merely provide a descriptive list of circumstances that may lead to annulment of a marriage; On the other hand, China's Judicial Interpretation I on Marriage and Family does not explicitly prohibit spouses from applying to the court for annulment of marriage under circumstances other than those stipulated in Articles 1052 and 1053. In short, the marriage validity system stipulated in China's Civil Code is a kind of "semi-open and semi-closed" structure, so the general provisions of civil legal acts can be applied to the validity of marriage^[1,9]. When we talk about the applicability of a theory or idea, we really need to be more careful and comprehensive. After all, the applicability of a theory depends not only on its own rationality, but also on the test and proof of practice. Although the exact extent to which this question applies remains to be discussed in theory and tested in practice, there is no obstacle, at least in qualitative terms, to its application.

Second, the general provisions of the General Provisions of China's Civil Code naturally apply to each of its sub-parts, as do the provisions of the Marriage and Family Division. With regard to the validity of marriage, the legislator did not intend to limit it to three clearly defined legal provisions in the title of marriage and family, otherwise it would have been possible to continue to adopt a legislative framework in which civil law and marriage and family law were independent of each other, rather than treating marriage and family as a separate part of civil law. Therefore, if the existing laws of the Marriage and Family Title are insufficient to solve practical problems, it is appropriate and useful to find the legal basis for solving these problems in the general provisions of the General Title^[7,12]. At the same time, it should also be pointed out that due to the particularity of the marital act itself, there will inevitably be some cases that are not fully applicable to the general provisions. In this case, it must be combined with the principle of "special law takes precedence over general law" under the general provisions or restrictive interpretation methods to maintain this particularity.

In short, compared with China's Marriage Law, the marriage validity system in China's Civil Code is not limited to the codification framework of marriage and family itself. In an incomplete closed framework, it allows the general rules on the validity of civil acts to be applied conditionally and selectively to the validity of marriage. In other words, if we insist that the marriage validity system in China's Civil Code is completely limited to the scope of marriage and family, then solving such numerous and complicated marriage problems in China's judicial practice can only be based on judicial interpretation and other special provisions, which will lead to the actual destruction of the legal system of China's Civil Code. Even if we insist on the mode of separation between civil law and marriage and family law, the application of general provisions of civil law in marriage and family law cannot be completely avoided in actual judicial operation. Because marriage and family relations are also universal in civil legal acts, property rights changes, creditor's rights establishment, etc., marriage and family law should also cover general provisions, property rights rules and contract elements. These elements play a fundamental and guiding role in marriage and family law to ensure harmonious and stable marriage and family relations and fair application of the law.

3.2 Legal Regulation of Concealment of Sexual Orientation in Marriage

3.2.1 Constituting Voidable Marriage

Fraudulent civil legal acts can be annulled, and fraudulent marriages can likewise be annulled. With regard to fraudulent marriages, Article 1053 of China's Civil Code stipulates that if one party fails to truthfully inform the other party of a

“serious illness,” the other party may request the annulment of the marriage. The legislator considers that a serious illness seriously affects the common life of the spouses and the healthy development of their children, and involves problems of a marital nature, and the spouses have the right to know and terminate the marriage by means of annulment. The comparison shows that concealment of sexual orientation in marriage is fully consistent with the spirit of article 1053, except for specific concealment. In fact, in the drafting and compilation of China’s Civil Code, legislators have fully considered the fraud phenomenon such as concealing sexual orientation in marriage. Although the issue is not directly mentioned in the published legal provisions, legislators have maintained a high level of concern about the issue. This approach not only avoids disputes that may arise from direct involvement in sensitive issues, but also retains flexibility in dealing with related issues in judicial practice. This legislative strategy reflects a balance between legal rigor and social reality.

It is argued that because of the special nature of marriage and family relations and the principle of maximizing the interests of the child, even if concealment of sexual orientation in marriage constitutes fraud, it should not be considered voidable marriage. But this is not sufficient to support his view: first, the authenticity and freedom of expression of the will of one of the spouses is seriously impeded by the fraudulent marriage of the other. The reason why the law restricts the exercise of revocation right to a certain extent is that it considers the trust interests of the opposite party, but in the case of fraudulent marriage, it is obviously unnecessary to protect the so-called trust interests of the other party. Therefore, there is no reason to restrict the exercise of the right and freedom of a bona fide spouse to annul a fraudulent marriage. Second, annulment of the fraudulent marriage does not violate the principle of the best interests of the child^[14]. China’s laws do not distinguish between children born in wedlock and children born out of wedlock, so there is no question of maintaining marriage in order to protect the legal status of children. In the case of a fraudulent marriage breakdown, such as concealing sexual orientation, the child is not a victim, but a beneficiary. It is actually in the best interests of the child to choose to annul the marriage or divorce. Moreover, the principle of maximizing the interests of the child is centred on balancing the interests of parents and children and emphasizing the priority given to the interests of the child rather than simply sacrificing the interests of parents for the sake of the interests of the child. This principle aims to ensure that children receive adequate protection and attention within the family and society and that their rights and interests are guaranteed to the maximum extent possible.

According to the relevant provisions of China law, natural persons with corresponding qualifications have the right to decide whether to marry or not, indicating that the marriage relationship between natural persons and other persons must be based on the true will of both parties and that there are no influencing factors such as coercion or fraud. Coercion is a valid reason for annulling marriage because it seriously violates the principle of freedom of marriage. Fraud, like coercion, means that one spouse’s expression of will is not entirely free, and marriages such as concealing sexual orientation clearly lack any basis for legal recognition and protection. And sexual orientation cannot be changed by mating with the opposite sex, which means that in fraudulent marriages the basic needs of the spouse in marriage and family relations are not met. Concealing a serious illness, as another circumstance under which a marriage can be annulled, provides a basis for fraud, such as concealing sexual orientation, to be included in the statutory grounds for annulment of marriage. And there is a chance that “serious illness” can be cured, but the law gives spouses the right to revoke to protect their legitimate rights and interests. Sexual orientation is not only impossible to change after birth, but it is equally destructive to marriage and family. Therefore, whether based on the theoretical connection between marriage and family and general provisions, or according to the actual needs of social life, fraudulent marriage such as concealing sexual orientation should be revoked. This is not only respect and protection for individual rights and interests, but also adherence to and maintenance of social justice and marriage and family system.

3.2.2 Specific Legal Procedures

The relationship between general provisions and marriage and family is between general law and special law. In principle, only when the provisions of special law are difficult to solve practical problems can the provisions of general law be applied. If, however, the general provisions of the General Part cannot be reasonably applied in the light of the above rules, the source of law, such as fundamental principles of law, should continue to be sought. Therefore, under the Civil Code system of China, the following steps can be followed to solve the problems caused by fraudulent marriage, such as concealing sexual orientation in marriage^[15]:

First, applicable legislative provisions should be sought in the Marriage and Family Code. According to the principle of “special law takes precedence over general law”, the special law provisions of marriage and family should be applied first in the field of marriage and family. If one of the spouses wishes to annul the fraudulent marriage *ab initio*, he or she shall first determine whether the marriage contracted by the parties meets the conditions set forth in article 1053. Because in China’s judicial practice, many homosexuals not only conceal their sexual orientation, but even conceal the fact that they suffer from serious infectious diseases such as AIDS from their spouses before marriage. In such cases, one of the spouses may directly invoke the provisions of article 1053 on concealment of a serious illness to request annulment of the marriage. However, if there is no deliberate concealment of a serious illness or if the concealed illness does not meet the criteria of seriousness in judicial interpretation, the marriage relationship may not be annulled under the provisions of this article. In cases where the provisions of article 1053 are not met, it may be searched whether conditions exist for invoking other legal provisions of the Marriage and Family Code. If one of the spouses does not intend to annul the marriage in order to restore unmarried status, he or she may file an application for divorce directly under article 1079, and may claim damages from the other spouse under article 1091 if he or she has suffered damage as a result of the fraudulent marriage.

Second, if no result is found in the internal provisions of the Marriage and Family Division, either spouse may request the annulment of the marriage relationship in accordance with the provisions of Article 148 of the General Provisions of China’s Civil Code. At the same time, since the concealment of the other party’s sexual orientation is the “fault” that led to the annulment of the marriage, the bona fide opposite party can claim compensation from the party who maliciously concealed his sexual orientation. In addition, according to the provisions of Article 1001 of the Title of Personal Rights, the protection of identity rights arising from marriage and family relations and other reasons is not explicitly provided for in the General Title, Marriage and Family Title and other laws, and the specific provisions of this Title on the protection of personal rights may be applied according to their nature.

In view of the difficulty of divorce litigation for one spouse, the author has the following suggestions: First of all, the cohabitation of spouses with others should not be limited to the opposite sex. Cohabitation by a spouse of the same sex is also a breach of the duty of loyalty and a serious violation of the rights of the spouse. Therefore, China’s law should determine the illegality of spouses and same-sex cohabitation to protect the right of innocent parties to compensation. Secondly, the concealed party is in a weak position in providing evidence. The concealment of homosexual activities makes it impossible to obtain legal and effective evidence, which obviously increases the burden of proof of the concealed party, thus not conducive to protecting its legitimate rights and interests. The rule of reversal of the burden of proof is applied, whereby if the evidence presented by the concealed party does not directly prove that his or her spouse is homosexual, the concealing party shall bear adverse consequences if he or she cannot prove that he or she is not homosexual, so as to reduce the burden of proof of the concealed party^[5]. Thirdly, the party providing evidence must provide legal evidence without violating the privacy of the spouse, otherwise it will not be recognized by the court. However, because of the hidden nature of homosexual activities, evidence collected by a spouse may violate his privacy and may not be accepted by judges. Therefore, the certification rules can be adjusted accordingly. If the evidence can prove the basic circumstances of the case, although it involves the privacy of one spouse, but does not adversely affect the third party and the public interest, it can be considered legal to a certain extent and accepted by the judge

At the same time, various social organizations in China, represented by women’s federations, should also be called upon to actively carry out publicity and education work and raise women’s discrimination ability by holding lectures and seminars. And professional psychological counseling team should be established to provide timely and effective psychological support for the same wife group, effectively alleviate the mental pain suffered by the group of wives of gay men in mixed marriage, and maintain the legal rights of special groups to the maximum extent through various ways^[4].

4. Conclusion

Marriage, as the core element of family, supports the stability of the whole family system, while family, as the basic unit of society, can reflect the overall state of society. A harmonious and happy family is the internal driving force for the stable development of national society. In fact, the matrimonial family order, as a humanitarian order expressly recognized by law,

is based on the voluntary union of spouses, expressed in physical and psychological interaction between spouses, moral and material support, and the joint maintenance of this stable relationship by spouses and family members. At this moment in our quest for freedom and liberation, it is still difficult to deny that marriage fundamentally needs to be a stable and lasting long-term relationship. On the one hand, it refers to the intrinsic bond between spouses arising from a commitment of loyalty, and on the other hand, the consanguinity and affinity arising from marriage further strengthen this legal relationship based on loyalty. Moreover, marital relationships increase the ability of spouses to assume external responsibilities, which not only means that they increase the ability of both spouses to withstand unexpected risks, but also increases the likelihood that third parties expect both spouses to fulfil their obligations. In other words, through marriage, the spouses achieve a certain degree of responsibility integration, which obviously requires the long-term stability of the marriage relationship as a kind of credit guarantee provided by the husband and wife^[16].

However, fraudulent marriage, such as concealing sexual orientation, has brought us many realistic contradictions and great challenges in the long run. Due to the influence of social tradition and the limitations of existing laws, we must provide workable solutions to this problem. A fraudulent marriage that conceals sexual orientation is actually a restriction on the freedom of one party by virtue of the marriage relationship. It not only seriously violates the other party's legal rights and vital interests, but also seriously affects the basic stability of marriage and family. If it is not dealt with in a timely manner, its chain reaction may cause non-negligible damage to the overall prosperity of the country and society. Therefore, not only should the law not recognize the validity of fraudulent marriages concluded by concealing sexual orientation, but it should also give more room for choice to the bona fide spouse. However, under the current system of China's Civil Code, the validity of fraudulent marriage, such as concealing sexual orientation, has been well solved. This not only helps protect women's legitimate rights and interests and maintain family harmony, but also encourages people to attach importance to marriage and cherish family happiness.

Marriage and family law requires the promotion of family virtues, joint debt signing, daily family agency rights, divorce calm period, divorce compensation and fault compensation, etc., which also reflect the requirements of marriage and family to maintain the integrity and stability of marriage and family. Same-sex marriage has been legalized in many countries and regions, but in China, the legal status and rights protection of homosexuals has always been a controversial topic. Although the acceptance of homosexuals in society is gradually increasing, at the legal level, the protection of homosexual rights and interests still faces many challenges. However, it is worth noting that according to the relevant provisions of China's Civil Code, homosexuals can endow their partners with certain legal status and identity through "voluntary guardianship" and "living will," which not only respects the individual wishes of homosexuals, but also protects their legitimate rights and interests to a certain extent.

China's Civil Code, with its clear and detailed legal provisions, provides clear guidance for the establishment, maintenance and dissolution of marriage. The author believes that with the advent of the era of China's Civil Code, the hotbed of mixed marriage will cease to exist, and the problems related to the group of wives of gay men will also be solved under the sunshine of the rule of law, so that they can strive for their due dignity and rights and interests within the legal framework. Society's understanding of marriage will also be clearer, and the concept of marriage will gradually return to the right track. Marriage is no longer just a simple union, but a legal relationship based on equality, respect, trust and responsibility. People begin to attach importance to the stability and long-term nature of marriage, and no longer regard marriage as a child's play easily. Under the guidance of the Civil Code, China's marriage and family system will continue to improve to provide a more stable and harmonious marriage and family environment for the people.

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