

Marital Rape in China and the UK

*---Problems in the Current Approach to
Culture and Law*

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Thesis submitted for the degree of Doctor of Philosophy
Law School
The University of Edinburgh

2005



DECLARATION OF ORIGINALITY

I hereby declare that, except where otherwise stated, the research recorded in this thesis and the thesis itself was composed and originated entirely by myself at the Law School, the University of Edinburgh.

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Introduction

This thesis was inspired by a current problem of Chinese law. The problem, in brief, is the inconsistency between the legislation, which criminalizes marital rape, and the judicial practices, which decriminalize marital rape, along with the controversy about whether or not marital rape should be criminalized. The problem of the criminalization of marital rape has been at the center of attention in Chinese society during the last three or four years. Unlike in the UK, where an agreement has been reached on the criminalization of marital rape in both legislation and judicial practices, whether or not a husband can rape his wife is still a matter of discussion and debate in China, and remains controversial at the time of the writing of the thesis. While the present Chinese Criminal Code prescribes that a husband can rape his wife, the legislation is not followed by the judges in judicial practices and is also rejected by many legal scholars. The thesis thus aims firstly to explore this question, trying to answer problem of Chinese marital rape law with a solution based on empirical researches in the specific Chinese context and the comparative studies of the UK.

As a result of addressing the practical problem of Chinese marital law, the thesis also tries to reflect on the theoretical problems involved, such as the methodologies of current comparative law and approaches to law and culture studies. The thesis will argue that the dilemma of current Chinese marital rape law has its roots in the law's status as a legal transplant. Transplanted from the West, it is not surprising that marital rape law is incoherent with traditional Chinese ethics and other cultural presuppositions. However, it is the widespread misunderstandings of the concept of culture, as well as the mechanism through which culture exerts influences on law, that has bedevilled the academic and political analysis of this issue. The misunderstandings concerning culture and law in turn result from insufficiencies in the methodology of comparative law to incorporate culture and law studies. Therefore, the other crucial goal of the thesis is to propose a new approach of culture and law studies for the solution of the Chinese marital rape law problem.

So, in Chapter 1, before the concrete discussions of Chinese marital rape law, I will first give a brief review of comparative law as discipline. I will suggest that the present approaches are inadequate both for the studies of cultural impacts on legal transplants as well as the prevalent understandings of the concept of culture. Then in the third part of Chapter 1, I will give a brief review of the writings about marital rape in China.

In Chapter 2, I will give fairly thorough introduction to the background of marital rape in China, including the relevant legislation, judicial practices, law people's debates and lay people's attitudes. I demonstrate a historical evolution of rape law in Chinese legislation from the feudalist China to the current criminal code, which now covers the crime of marital rape. As readers can see from the legislative history, the crime of marital rape in the current Chinese code is the result not of the gradual evolution of native Chinese legal tradition but of the abrupt legal borrowing from the West. For judicial practices, I have collected all the marital rape cases available in China from various sources. By studying the decisions made by the courts in all the cases collected, I find that the marital exemption of rape is still the major principle followed by Chinese judges. I then introduce the reader to the major opinions and

debates of legal scholars and lawyers about marital rape. Readers are pointed to the present approaches to culture and law studies that are employed by these writers. Finally I introduce the attitudes of the public, the common people, towards the problem of marital rape. Lay attitudes are the most fundamental cultural elements affecting law. These attitudes are based on the empirical data collected from the 800 questionnaires in surveys I conducted in one middle-sized city and, especially, three villages and one small rural town. With the surveys focusing on rural areas, the results should be representatives of the attitudes of the rural population, which make up the largest portion of Chinese population. Overall, I aim in Chapter Two to offer a pure descriptive picture of marital rape problem in China, which will later on work as the empirical foundation for my theoretical analyses in the next chapter.

Chapter 3 will analyze the empirical data obtained in Chapter Two. I will examine the same data with two different approaches and try to make comparison between them. First I will analyze them with the current culture approach. I then construct my alternative account based on the theory of memetics, which will be introduced in detail as the preparation for my theoretical construction. The core of my new approach is to offer a different way of understanding what culture is and to depict a concrete mechanism through which cultural elements exert their influence on law. After the new methodology is constructed, I will use it to analyze again the empirical data in Chapter One. Arriving at different conclusions, I will try to show how the new approach can make up the insufficiencies of current approach and provide better solutions to the Chinese marital rape law problem.

After addressing the problem of Chinese marital rape law, I will turn to the west in Chapter 4, taking the UK as an example to gather more support for the validity of the new approach. In this chapter, I will review the evolution of marital rape law in England, together with Scotland, and examine how cultural elements worked in the evolutionary process of law. Finding my new approach also applicable here in a cultural environment so different from China, the new approach may make itself better established.

The final Chapter 5 is a revisit to the theoretical context of marital rape. In this chapter, I hope to provide, on a theoretical level, possible solutions to the problems found in Chapter 1. I will try to argue that the memetic approach is the remedy for the comparative law's methodological inefficiency concerning marital rape, and it can also overcome the conceptual deficiency of culture.

Chapter 1 Putting marital rape into

theoretical context

The aim of the thesis is to pursue the solution of the problems surrounding the current Chinese marital rape law. The core of the problem, as I will explain in detail, is that the legislation criminalizing marital rape is not followed in the judicial practice. But before I start the specific study of marital rape law in China, I will give in this chapter a general introduction to the theories and methodologies that are currently available to offer possible solutions to the problem.

A central role is played by comparative legal research. Marital rape law in China is essentially a legal transplant from the West. The work of Alan Watson has demonstrated how comparative law can address the problems pertinent to my study, like how a legal transplant can survive in a foreign society. So the discipline of comparative law will be the first that I will offer a short account of in this chapter.

Another important element concerns the concept of culture. As I will argue, the root of the problem of Chinese marital rape law lies in the conflicts between its western origin and its traditional Chinese cultural environment. An analysis of this question obviously presupposes a shared and explicit understanding of “culture”. Since it is far from granted that such a shared understanding exists in the literature, I will try to give a basic overview of the most prevalent assumptions in this field.

Finally, I will also conduct a literature review in China of the criminalisation of marital rape, through which we can have a brief idea about to what extent the current methodology can be helpful with the marital rape problem in China, and, on the other hand, what inadequacies of current methodology have actually contributed to this problem of law.

1.1 Review of comparative law

1.1.1 General

Comparative studies of law in the broadest sense have had a long history in both the east and the west. Throughout Chinese history, there are frequent examples of comparative studies between different legal systems. During the so called the “Spring Autumn and Warring State Period” (770 ---221 BC), China saw the emergence of a multitude of small kingdoms, each of which had its own legal system. While these small kingdoms were trying to prevail in the tough competition for survival, each of them felt the need to improve their legal system as the means to increase their power. Therefore, learning and borrowing from other legal systems became popular.¹ This is why the School of Legalists (FA JIA) flourished, and also what promoted the comparative studies of other legal systems at the time. An example is the first recorded law code in China, FA JING (The Code) compiled by Li Li (about 455---

¹ Shen Zongling, *Study of Comparative Law*, Peking University Press, 1998, p33-34.

395BC) from the Kingdom Wei. Li was said to have “collected the codes of all the kingdoms in order to make his six chapters of FA JING”.²

After the reunification of China by the First Emperor in 221BC, synchronic comparisons of different legal systems in different countries became virtually impossible. This is primarily because the unified China established a tradition of centralized state power, which supplemented the legal systems of the small kingdoms with one centralized legal system. While there were occasional contacts in history with some different civilizations or kingdoms or tribes neighbouring China, like the Huns or Mongolians, or the kingdom of Japan, Chinese feelings of the superiority of their own legal and political system precluded study of different legal systems.³ However, diachronic comparisons between the laws of different dynasties had remained an important tradition till the very last dynasty of Qing.⁴

The diachronic comparative studies of the laws of previous dynasties were typically instigated by the lawmakers of the new sovereign. As a rule, the sovereign of a new dynasty immediately tried to replace the existing law through a code of their own at the beginning of their reign.⁵ These new codes, however, never result in a total break with the past. On the contrary, the newly imposed law would frequently refer to the law of the previous dynasty or dynasties. This is almost a universal pattern whenever there was a change of dynasties.⁶ For example, even before the foundation of Qing dynasty, the Manchurian emperor, Huangtaiji, had decided the principle of “referring to the laws of Han Chinese and Jin”, (CAN HAN ZHUO JIN), for the establishment of the Manchurian Kingdom’s own legal system.⁷ After Qing dynasty was founded, Emperor Shunzhi issued a decree, demanding “detailed translations of Ming laws into Manchurian language (XIANG YI MING LV)” for the making of Qing laws.⁸ Thus the legislation of early Qing codes involved deep and systematic comparative studies of the laws of Ming and other previous dynasties.⁹

The diachronic comparative studies were also carried out by the historians of each dynasty. It was a tradition that each Chinese dynasty would write an official history of its own and often the history of the previous dynasty as well, usually known as dynastic histories. There were also several well known non-official histories written by individual historians.¹⁰ Usually in each of the histories, there are special volumes on laws, which recorded and also made comments and comparisons of the legal systems of different dynasties.¹¹ For example, the Law Volume in HAN SHU, the Dynastic History of Han, gave systematic records of the changes and developments of law from Zhou, Qin till the late West Han Dynasty.¹²

The diachronic comparative studies were also done by the traditional LV XUE JIA, or the traditional Chinese law scholars.¹³ LV XUE JIA had a wide range of objectives of study, covering lawmaking, legal interpretations, legal enforcement,

² *Commentaries of Tang Codes (TANG LV SHU YI)*, vol. 1.

³ Shen Zongling, p33.

⁴ Shen Zongling, p34.

⁵ Shen Zongling, p34.

⁶ Shen Zongling, p721

⁷ Wang Limin, *The History of Chinese Law*, China Finance and Economy Press, 2001, p381.

⁸ *Ibid.* p382.

⁹ *Ibid.* p382.

¹⁰ SHI JI (*The History*) by SIMA QIAN, for example, covers several dynasties starting from the legendary emperors through Xia, Shang, Zhou, till Qin and Han Dynasty when the author lived.

¹¹ Shen Zongling, *Study of Comparative Law*, p721

¹² Ban Gu, *Law volume in the Dynastic History of Han (HAN SHU XING FA ZHI)*, Zhonghua Book Company (ZHONG HUA SHU JU), 1962, p1079.

¹³ LV XUE JIA, the traditional Chinese law scholars, is now a term in Chinese language to distinguish from FA XUE JIA, or the law scholars in the modern western sense.

forms of law, comparative studies of laws in different dynasties, relations of law with morality and LI, methodology of case study, etc. On a micro-level, they studied whether a crime was well defined or whether a particular word was appropriate or not to the precise meaning that a legal rule tried to convey. On a macro-level, they studied the questions like the origin of law or the social function of law.¹⁴ Xue Yunsheng (1820-1901) in late Qing is an example. He compiled the 30 volumes of *Co-compilation of Tang and Ming Codes*, in which he carried out deep comparative studies of Tang and Ming codes. After the full Tang and Ming Codes, Xue attached at the end of the book also the special laws and decrees in the two dynasties. He compared and analyzed the concrete provisions of the two codes, finding their advantages and disadvantages, locating the sources of the laws, and arriving at the conclusion that the *Tang Code* was generally better than the *Ming Code*.¹⁵

However, comparative law, as it is practiced today as a scientific and theoretical discipline, is totally of western origin. In ancient Greece, the large number of city-states offered a very good chance for comparative studies of different legal systems. Solon of Athens based his own famous legislation on comparative studies of laws in other city-states.¹⁶ Plato, in *Laws*, also provides a comparison of the laws of the city-states, describing them as well as testing them against the ideal constitution that he abstractly constructed.¹⁷ Aristotle is said to have examined the constitutions of no less than 153 city-states, though only his treatment of Athens has survived.¹⁸

Rome was usually thought to have no tradition of comparative legal scholarship, mainly because of their feelings of the superiority of their own laws.¹⁹ However, in 5th century BC, when the *Law of the Twelve Tables* was being made, people were sent from Rome to study the laws in Greece.²⁰ And according to some comparatists, the first work of comparative legal studies in the west was the *Collatio legum Mosaicarum et Romanarum* in 4th century²¹, in which comparison was made between the Roman law and the law of Moses, though the author of the work is unknown.²²

In the Middle Ages, given the dominating authority of canon and Roman law, comparative study of law was in decline. We do find however some comparative studies between canon and Roman law,²³ or, in England, the comparisons between the Common Law and Roman law, for instance, in the works of Fortescue, *De Laudibus legum Angliae* or *The Governance of England*.²⁴

The *Age of Humanism* was the age of the recognition of the theoretical value of the methods of comparative law.²⁵ Francis Bacon is said to be the first one to use the term of comparative law. In reply to the enquiry of James I about the integration of the laws of England and Scotland, he suggested that lawyers from the two nations "should collaborate in the preparation of a digest in which the laws of the two countries 'may be collated and compared and that the diversities may appear and be

¹⁴Wu Jianfan, Ma Xiaohong, *Interpreting Traditional Chinese Laws, Promoting Traditional Legal Merits*, <http://www.cass.net.cn/webnew/file/200302285449.html>

¹⁵ Xue Yunsheng, *Co-compilation of Tang and Ming Codes*(TANG MING LV HE BIAN), Law Press, 1999.

¹⁶ Shen Zongling, p21.

¹⁷ Zweigert and Kötz, *An Introduction to Comparative Law*, Clarendon Press, Oxford, 3rd edition, 1998, p49.

¹⁸ Zweigert and Kötz, p49.

¹⁹ Zweigert & Kötz, p49.

²⁰ Livy, Book III, *The History of Rome*. See *Livy with an English translation by B. O. Foster*; London: William Heinemann, New York: G. P. Putnam's Sons, p109.

²¹ Gutteridge, *Comparative Law, An Introduction to the Comparative Method & Research*, Cambridge University Press, 1949, p. 11.

²² K. Kagan, *Three Great Systems of Jurisprudence*, 1955, pp.4-5.

²³ Shen Zongling, p22.

²⁴ Zweigert & Kötz, p49-50.

²⁵ Zweigert & Kötz, p50.

discerned”²⁶ He stated in his essay, *De dignitate et augmentis scientiarum*, that the lawyer must free himself the vincula of his national system before he can estimate its true worth: the object of judgment (the national law) cannot be the standard of judgment. “The perception, as valid now as ever, justifies all comparative researches”.²⁷ The German philosopher G. Leibniz has also made his contribution, with his design of a plan for the comparative study of the laws of all peoples, places and times.²⁸ Later on, Grotius, Montesquieu, and others “have expressly used the method of comparative law to give empirical support to the teachings of natural law”²⁹.

Though comparative approach had been occasionally applied in the past, according to R. David, however, comparative law was not recognized as an independent discipline or a basic methodology of legal science before 19th century.³⁰ The mid and late 19th century saw many important events marking the rise of comparative law as an independent discipline of legal studies, most importantly perhaps, the foundation of the International Congress for Comparative Law, launched by the French scholars Edouard Lambert and Raymond Saleilles in Paris in 1900. This marks the beginning of comparative law as we know it today.

At the Congress, comparative law was given the aim of finding the “droit commun legislatif”, or the common law of mankind, according to Saleilles. Such a confident claim was in tune with the historical circumstances of the time, the “disarming belief” in progress or rationalism.³¹ Under these circumstances, rationalism was expected to offer a methodology with sufficient power to overcome any legal differences or barriers to the destination of achieving the goal set for comparative law. “At this stage in methodology, the principal aim and object of comparison is to create a rational science of law which could permit the formulation of norms appropriate to nineteenth century society in Continental Europe”.³² Measured against such a belief in rationalism, differences of different legal systems, like cultural differences, could mostly be “accidental” and surely be overcome:

“Comparative law must resolve the accidental and divisive differences in the laws of peoples at similar stages of cultural and economic development, and reduce the number of divergencies in law, attributable not to the political, moral, or social qualities of the different nations but to historical accident or to temporary or contingent circumstances”³³.

However, later development of comparative law did not follow the roadmap as drawn at the Congress. “The belief in progress, so characteristic of 1900, has died. World wars have weakened, if not destroyed, faith in world law”.³⁴ Cultural differences, accordingly, are not as easy to handle as expected. Subsequent

²⁶ Gutteridge, *Comparative Law, An Introduction to the Comparative Method & Research*, Cambridge University Press, 1949, p14.

²⁷ Zweigert & Kötz, p50.

²⁸ *Leibniz's Philosophical Papers and Writings*, ed. by L. Loemker, D. Reidel Publishing Company, Holland, 1969, p6.

²⁹ Zweigert & Kötz, p50.

³⁰ R. David, “comparative law, Study of” in *Encyclopedia Britannica*.

³¹ Zweigert & Kötz, p2-3.

³² Marc Ancel, “Les grandes etapes de la recherche comparative au XX^e siècle”, *Studi in memoria di Andrea Torrente* (1968) 21. Quoted from Zweigert & Kötz, *An Introduction to Comparative Law*, p59.

³³ Lambert, ‘Conception générale et définition de la science du droit comparé’, *Procès-verbaux des séances et documents, Congrès international de droit compare I* (1905) 26. Quoted from Zweigert & Kötz, *An Introduction to Comparative Law*, p3.

³⁴ Zweigert & Kötz, p3.

comparatists became rather modest and timid when talking about the aim and methodology of comparative law, especially in cases where radical cultural differences are involved.

Zweigert and Kötz published their *An Introduction to Comparative Law* in 1970s, the work of which “remains the single most important methodological exposition of comparative law and may serve as a representative for all comparative legal studies”.³⁵ In this work, Zweigert and Kötz established their well-known functionalist approach. Instead of the common law of mankind, they set for comparative law much more modest functions and aims: an aid to the legislator, a tool of construction, a component of the curriculum of the universities, and a contribution to the systematic unification of law and the development of a private law common to the whole of Europe.³⁶ To achieve the aims, Zweigert & Kötz rely on much more empirical and concrete methodology of functionality, referring to the concrete problems of life whose solutions are functions of law.³⁷ In law, the only things that are comparable are those which fulfill the same function, which means those which work as the solutions of the same problem of life.³⁸ Under this basic methodological principle, it is assumed that “the legal system of every society faces essentially the same problems”.³⁹

With this functionalist methodology, comparatists were able to efficiently conduct comparisons into a variety of legal problems, including obligations or property.⁴⁰ However, when faced with laws regulating highly culture specific practices, like for instance family law, Zweigert and Kötz seem to find their functionalist approach reaching the limits of its validity. By finding that there are many areas of social life influenced by especially strong moral and ethical feelings, particularities of religion, tradition, cultural development, etc, they admit “there are areas in comparative law where judgment must be suspended”.⁴¹

Apparently, the functionalist approach becomes problematic in comparative family law, and by implication also the marital rape problem. Kahn-Freund, however, while acknowledging the difficulty comparative law has with family law, takes a much more optimistic attitude towards such difficulty, based on his reading of Montesquieu. Montesquieu had thought that legal transplantation is possible only in most exceptional cases, where environmental factors, such as cultural, geographical, social and economic factors, are not operative.⁴² According to Kahn-Freund, the force of Montesquieu’s environmental factors are diminishing year by year while in today’s world political factors are playing a much more forceful role in legal transplantation than environmental factors like culture.⁴³ This is also true even with family law, whose cultural roots are so obvious.⁴⁴ He therefore concludes that, for the risk of rejection encountered by legal transplants, “all I have wanted to suggest is that its use requires a knowledge not only of the foreign law, but also of its social, and above all

³⁵ Burkhard Schafer, “Form Follows Function Fails---as a Sociological Foundation of Comparative Law”, *Social Epistemology*, 1999, vol. 13, No. 2, 113-128.

³⁶ Zweigert & Kötz, p16.

³⁷ *Ibid.* p34.

³⁸ *Ibid.* p34.

³⁹ *Ibid.* p34.

⁴⁰ *Ibid.* Part II, p323-708.

⁴¹ *Ibid.* p39-40.

⁴² Montesquieu, *The Spirit of Laws*, New York: Legal Classics Library, 1994. See Book 14-17 about law’s relation with climate, Book 18 about terrain, Book 20-21 about commerce, Book 24-25 about religion.

⁴³ Kahn-Freund, *On Uses and Misuses of Comparative Law*, *Modern Law Review*, 1974, vol. 37, p8-13.

⁴⁴ *Ibid.* part vii, p13-17.

its political, context. The use of comparative law for practical purposes becomes an abuse *only if* it is informed by a legalistic spirit which ignores this context of law.”⁴⁵

So, in contrast with the complete silence of the functionalist, Kahn-Freund tries to offer the option of political force as a counterweight against the cultural forces in family law. But in the eyes of Alan Watson, Kahn-Freund is still too conservative and pessimistic. In Watson’s opinion, systematic knowledge of the law or political structure of the donor system was not necessary for legal transplantation, and “successful borrowing could be achieved even when nothing was known of the political, social or economic context of the foreign law”.⁴⁶ Watson later on developed his notion of “law out of context” even further, claiming that “law is largely autonomous and not shaped by societal needs; though legal institutions will not exist without corresponding social institutions, law evolves from the legal tradition.”⁴⁷ And, “the connection of a legal rule with any one environment is less intimate than may be supposed. It is a characteristic of a legal rule to be made for and to fit into very different circumstances”.⁴⁸ Therefore, according to Watson, even if dramatic changes take place in society, politically, economically or religiously, the law can remain the same or change only a little.⁴⁹ And law can also travel cross jurisdictions with striking historical or cultural differences.⁵⁰ With such an approach, cultural elements or other factors in the social context becomes so unimportant to comparative law that they could often be virtually ignored.

On the other extreme, we find Pierre Legrand. While Watson completely denies the connection between law and social context, Pierre Legrand completely denies the possibility of legal transplants, claiming that “In any *meaningful* sense of the term, ‘legal transplant’, therefore, cannot happen”.⁵¹ And the reason given by Legrand to the impossibility of legal transplant is *culture*. Law, in Legrand’s own words, “is, first and foremost, a cultural phenomenon”,⁵² and therefore, a French painting can offer as much understanding of the French legal mind as any article of the French civil code.⁵³ However, it is impossible for one to know completely the mind from another culture. So, it is impossible for a French lawyer to think like an English lawyer just as it is impossible for us today to truly perceive the significance of Shakespeare’s play of ‘*The Merchant of Venice*’.⁵⁴ Thus, “how to compare now”?! What Legrand calls into doubt is not only the concept of legal transplant but the whole discipline of comparative law. Unsurprisingly, his assessment of existing comparative work is often scathing: “superficial”, “disappointing”, “extremely problematic, if not precarious”, etc.⁵⁵ Contrary to Watson, Legrand thinks that cultural differences make comparative law virtually impossible.

Zweigert and Kötz’s functionalist approach finds its limits in the cultural factors influencing law. Legrand offers as an answer his “culturalist” approach, a name chosen by me because the approach is based on cultural factor just as Zweigert &

⁴⁵ Kahn-Freund, “*On Uses and Misuses of Comparative Law*”, *Modern Law Review*, 1974, vol. 37, p27.

⁴⁶ Watson, “*Legal Transplant and Law Reform*”, *Law Quarterly Review*, 1976, vol.92, p79.

⁴⁷ Watson, *The Evolution of Law*, Oxford Blackwell, 1985, p119.

⁴⁸ Watson, *Society and Legal Change*, Temple University Press, 2001, chapter 9, p111.

⁴⁹ Watson, “*Law Out Of Context*”, *Edinburgh Law Review*, vol4, p147.

⁵⁰ For examples, see Watson, *Legal Transplant*, The University of Georgia Press, 1993, p108.

⁵¹ Pierre Legrand, “*Impossibility of Legal Transplant*”, *Maastricht Journal of European and Comparative law*, vol. 4, 1997, p120.

⁵² Legrand, “*How to Compare Now*”, *Legal Studies, The Journal of the Society of Public Teachers of Law*, 16(2), 1996, p236.

⁵³ *Ibid.* p235.

⁵⁴ *Ibid.* p237, p238.

⁵⁵ *Ibid.* p233-234.

Kötz's functionalist approach is based on functionality. But Legrand's culturalist approach offers little help either because such approach actually says that once there are cultural elements, we should just stop the comparative studies of law. For the functionalist in the tradition of Zweigert and Kötz, a rational comparison between Chinese and western law would have to presuppose a shared understanding of the problem the law tries to address. However, if there were such a shared understanding, transplantation of Western law should have been less problematic than it turned out to be in practice. For the culturalist approach of Legrand on the other hand, even the limited success of the transplant becomes inexplicable. So, from the silence of Zweigert & Kötz's functionalism to the virtual impossibility of comparison of Legrand's culturalism, comparative law so far has failed to offer an efficient methodology to deal with the culture-impacted laws like the Chinese marital rape law at hand.

1.1.2 Two problems of comparative law

The drawbacks in the methodology of comparative law inevitably cause problems to the academic study of foreign law, and even more to comparative law as a practical tool of lawmakers. Measured against its own aspirations, comparative law consistently fails to fulfill its core functions.

The first is the most fundamental function of comparative law: the ability to compare, or the ability to produce true comparisons and to establish comparative legal knowledge. Comparative law "is the comparison of the different legal systems in the world".⁵⁶ So the ability to compare is essential for comparative law to exist. As Zweigert and Kötz say, "no study deserves the name of science if it limits itself to phenomena arising within its national boundaries", "and comparative law offers the only way by which law can be international and consequently a science".⁵⁷ Also, "the method of comparative law can provide a much richer range of model solutions than a legal science devoted to a single nation", and "it dissolves unconsidered national prejudices, and helps us to fathom the different societies and cultures of the world and to further international understanding".⁵⁸ However, these aims can be achieved only when comparative law can justify the epistemological truth claims that it makes. Once it is accepted that there are at least some categories of laws which defy comparative analysis, the problem becomes one of demarcation. However, as our overview of the methodological history of comparative law has shown, these demarcations are highly unstable. Once we have established why some laws defy comparison, the same reasons seem to apply equally to other fields of law. Once culture is accepted as limitation of comparative analysis, the next step, the claim that all laws are culturally determined, seems inevitable.

The second function of comparative law is its use as a tool for law makers. "Legislators all over the world have found that on many matters good laws cannot be produced without the assistance of comparative law".⁵⁹ The benefit of legal transplants, which "is extremely useful for law reform in developing countries",⁶⁰ is what makes comparative law so attractive to modern day China. China is now heavily engaged in constructing the so-called "the modern legal system of China" through the

⁵⁶ Zweigert & Kötz, p2.

⁵⁷ Ibid. p15.

⁵⁸ Ibid. p15-16.

⁵⁹ Ibid. p16.

⁶⁰ Ibid. p16.

transplantation of western models and solutions.⁶¹ Zweigert and Kötz seem quite happy to confirm to Chinese people this significant function of comparative law by claiming that “even outside Europe states which used to be ‘Soviet republics’ are finding that foreign laws can be of assistance in framing domestic legislation, as have the (People’s) Republic of China and many of the developing nations in Africa”.⁶²

It is true that these two functions are performed well in many cases. But it is equally true that in at least as many cases, comparative law dramatically fails to live up to its expectations. I will give to each of the above functions an example in which the function of comparative law is not fulfilled.

The first example of the limits of comparative law in fulfilling its main function, the production of true comparative knowledge, is given by Zweigert & Kötz themselves in their *An Introduction to Comparative Law*. After analyzing concrete examples with their functionalist method, Zweigert and Kötz seem to have proven the expected effectiveness of the approach and happily confirmed their conclusions that: “different legal systems give *the* same or very similar solutions, even as to detail, to the same problems of life, despite the great differences in their historical development, conceptual structure, and style of operation.”⁶³

However, when they come to a special category of laws that are deeply affected by cultural elements, of which family law is a typical example, Zweigert and Kötz suddenly become much less confident with the above conclusion and start to hesitate:

“Should freedom of testation be curtailed in the interests of a decedent’s widow and family? Under what conditions should divorce be possible? Should same-sex marriages be permitted or some comparable legal regime be on offer? Should unmarried persons be allowed to adopt?”⁶⁴

Recognizing the difficulty in answering all the family law problems, Zweigert & Kötz admit:

“It is true that there are many areas of social life which are impressed by especially strong moral and ethical feelings, rooted in the particularities of the prevailing religion, in historical tradition, in cultural development, or in the character of people. These factors differ so much from one people to another that one cannot expect the rules which govern such areas of life to be congruent.” And “So there are areas in comparative law where judgment must be suspended, where the student simply cannot say which solution is better.”⁶⁵

The suspension of judgment reveals serious problems in the ability to produce true comparative knowledge, which has actually taken away the most fundamental foundation for comparative law to exist, either as a theoretical discipline or as a practical tool. In fact, there has been a long-standing view that family law presents

⁶¹ Shen Zongling, p724-725.

⁶² Zweigert and Kötz, p17. The original text of Zweigert and Kötz is “the Republic of China” while they actually refer to the People’s Republic of China. Zweigert and Kötz made a political as well as legal mistake here. The official name of what is usually known as China now, with Beijing as the capital, is the People’s Republic of China not the Republic of China. The Republic of China was used as the name of China from 1911 to 1949. However, the Chinese island of Taiwan, still, temporarily claims itself as the Republic of China, which, according to most national governments and the international law, is not an independent nation.

⁶³ Zweigert and Kötz, p39.

⁶⁴ Ibid. p39.

⁶⁵ Ibid. p39, p40.

particular difficulties for comparatists.⁶⁶ But inability to compare means much more than difficulty but virtually the impossibility of comparative law *per se*. No wonder some people even doubt whether there can really be comparative family law.⁶⁷

Once this is acknowledged, the very discipline of comparative law is in trouble. According to the basic assumption of comparative law, these family laws ought to be comparable because they are about the same problems of life, like same-sex marriage laws for instance, which are regulation of two people coordinating their lives in a particularly intimate way. But they turn out to be incomparable. This indicates a tension in the methodology of comparative law.

Meanwhile, on a more practical level, other functions of comparative law like international understanding and the general science of law can no longer be fulfilled either, at least in the field of family law. This however would be deeply worrying. After all, most international private law cases are concerned with family law, and here lawyers seem to find it unproblematic to decide whether or not foreign legal concepts are functionally equivalent to domestic law. Comparative law should at least be able to explain this ability of lawyers, many of whom are untrained in comparative legal analysis.

The example of Chinese marital rape law, the main theme of the thesis, exemplifies the failure to fulfill the second function of comparative law, that of supporting legislators. As in many traditional societies, coercive sexual action by the husband against his wife was not recognized in law as a crime in China.⁶⁸ However, the idea of criminalizing marital rape has entered Chinese legislation, not as a result of native social evolution but as a part of the governing elites' effort to learn from the west.⁶⁹ Without excluding husband from the subject of the crime of rape, present law has made marital rape a crime.⁷⁰

But, in practice, in most marital rape cases so far, defendants were not convicted despite of the provisions of the code.⁷¹ Indeed, when commenting on one of the few cases in which the defendant was convicted, the Supreme Court still concluded that "generally speaking, husband cannot be the subject of the crime of rape against his wife"⁷², which is contrary to express statutory provision.

Legal transplantation has brought the laws against marital rape to China, but it has turned out to be ineffective when confronted with social reality in China. Chinese marital rape law thus becomes a counterexample of Alan Watson's theory of law out of context, and it also fails comparative law's function, claimed by Zweigert and Kötz, to help the lawmakers produce "good laws".⁷³

1.2 Review of theories of culture

After the review of the discipline of comparative law, I will briefly discuss some common perceptions of the term "culture". This is necessary to substantiate my argument that the problems identified above result from marital rape law's conflicts with traditional Chinese cultural elements. It is easy to say that culture influences law; it is easy to claim that cultural factors play a role in the problems of Chinese marital

⁶⁶ David, *'Convergence in Family Law: Mirrors, Transplants and Political Economy.'* Oxford Comparative Law Forum 2 (2001).

⁶⁷ Glendon, "Irish Family Law in Comparative Perspective", 9 Dublin University Law Journal (1987), 1.

⁶⁸ See Chapter Two for detailed discussions.

⁶⁹ See the legislative background of marital rape law in Chapter Two and Chapter Three of the thesis.

⁷⁰ Wu Xiaofang, "Consortium & Marital Rape", People's Court Daily, 1st Nov. 2000.

⁷¹ See Chapter 2.2 of the thesis.

⁷² No. 1 Criminal Division, Supreme People's Court: *Reference to Criminal Trial*, Vol 2, 2000, p 28.

⁷³ Zweigert & Kötz, p16.

rape law. But it is essential for us to make clear first what we exactly mean by *culture* before we talk about its role in legal problems.

Quite often, the concept of culture functions as a catch-all expression, with too many different aspects covered under the same concept of “culture”. Language is doubtlessly an important part of a culture. So is food which typically varies from culture to culture. Is it the Chinese language, in which the Chinese marital rape law is written, that damages the law’s validity? Or is the greasy and oily Chinese food that makes it hard for the marital rape law to keep its feet on Chinese ground? Or, as Legrand says, does law have close connections even with artistic works like a painting? Can a concept that was developed in a culture that exhibited (at the time of its legal acceptance) pickled sheep as art be transferred to one dominated by socialist realism? What really is “culture” as usually understood in its relation with law?

Perhaps surprisingly, the very concept of culture for the Chinese people, like marital rape law, is something recently imported from the west. This of course does not mean that China was until then uncultured. Just that there was no need to have a single concept for the variety of cultural expressions pertinent in China. China’s own ethics, moralities, philosophies, art, literature, etc. had had such an overwhelming dominance for thousands of years in the whole world known to Chinese people that they just took all that is now called Chinese culture as absolute and ultimate, without the relativistic concept of culture. Or put differently, the very concept of culture also implies a concept of “the other”. Such a concept came into Chinese mind only when they realized at the beginning of 20th century that different cultures also existed in Europe and other parts of the world. From then on, Chinese understandings of the concept are also mostly imported from the west, at least as far as academic discourse is concerned.

As it is understood today in China, culture is usually taken as an ambiguous and uncertain concept. Professor Liang Zhiping says: “Culture, as a technical term, is a somewhat ambiguous and flexible concept. Definitions of it in academia should be no less than one hundred, but none could be accepted by all people as unchallenged authority”.⁷⁴ He mentions some of the definitions, all of which are western.

The first definition that he introduces is from Duncan Mitchell’s *A Dictionary of Sociology*, which defines culture as a complicated social phenomenon, covering beliefs, literature, arts, ideologies, technologies, etc. This definition covers almost everything.⁷⁵

The second example is from E. Tylor, who defined the culture in its widest anthropological sense as “that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society”.⁷⁶

Professor Liang also quotes the definition by the contemporary American anthropologist Alfred Kroeber, according to which culture is the mode of behavior, the core of which is traditional values.⁷⁷

Compared to Liang Zhiping, Professor Gong Peixiang from Nanjing University thinks the concept of culture is even more complicated. He refers to more than two hundred attempted definitions.⁷⁸ He tries to summarize them and classify these

⁷⁴ Liang zhiping, *On Law: The Past, Present and Future of Chinese Law*, Guizhou Renmin Press, 1992, p1.

⁷⁵ Ibid. p1.

⁷⁶ Ibid. p1.

⁷⁷ Ibid. p2.

⁷⁸ Gong Peixiang, *The Historic Logic of the Oriental Legal Culture*, Law Press, 2001, p2.

definitions into three different types. Again the examples he gives of each type are all western in origin.

The first type of definitions of culture, according to Professor Gong, are those in anthropological sense. These see culture as the mode of behavior of people. The example he gives for this type is also the definition by E. Taylor as Professor Liang has mentioned.⁷⁹

The second type are sociological definitions, which take culture as the life structure of social history and the system of value reflecting such a structure. And the example of this type is the definition in the Spanish *World Encyclopedia* that culture are all the social and material achievements and values, which constitute the civilization and are transmitted by the society.⁸⁰

The third type of definitions are psychological, which interpret culture in terms of the reflections of common importance of people's basic psychological status in the society. The example for this type is Freud who defines culture on the basis of the mechanism of social pressure and children's psychology.⁸¹

Let us now take a closer look at studies in the west, which exert considerable influences in China, and especially at the fairly recent studies from a law-related perspective.

R. Cotterrell gives a definition of culture in a broad sense, which "refers to the complex of belief, attitudes, cognitive ideas, values and modes of reasoning and perception which are typical of a particular society or social group. In this sense culture constitutes shared understandings, a common outlook reflected in numerous aspects of collective life."⁸²

Lawrence M. Friedman highly values the cultural studies of law. He thinks "legal culture is an essential intervening variable in the process of producing legal stasis or change".⁸³ He introduces sophisticated differentiation in the concept of culture by distinguishing for instance general culture and legal culture. He has defined the concept of legal culture in a way that has become almost a classic, which, according to Cotterrell, is probably the most sustained effort to build an explicit concept of legal culture and to defend theoretically its use.⁸⁴

Friedman states that legal culture "refers to public knowledge of and attitudes and behavior patterns toward the legal system". He then offers a variety of ways to deepen the understanding of the concept of legal culture from its relation with general culture. He claims that legal cultures may also be "bodies of custom organically related to the culture as a whole". Also, legal culture is a part of culture generally: "those parts of general culture --- customs, opinion, ways of doing and thinking --- that bend social forces toward or away from the law and in particular ways".⁸⁵

These definitions, according to Cotterrell, seem to be clusters of quite different things juxtaposed. He observes: "The imprecision of these formulations makes it hard to see what exactly the concept covers and what the relationship is between the various elements said to be included within its scope".⁸⁶

⁷⁹ Ibid. p2.

⁸⁰ Ibid. p2.

⁸¹ Ibid. p2.

⁸² Cotterrell, "The Concept of Legal Culture", Comparing Legal Cultures, Dartmouth, p25.

⁸³ Friedman, "The Concept of Legal Culture: A Reply", Comparing Legal Cultures, Dartmouth, p34.

⁸⁴ Cotterrell, "The Concept of Legal Culture", Comparing Legal Cultures, Dartmouth, p14

⁸⁵ Friedman, L.M., *The Legal System: A Social Science Perspective*, New York, Russell Sage Foundation, 1975, p193, p194, p15

⁸⁶ Cotterrell, "The Concept of Legal Culture", Comparing Legal Cultures, Dartmouth, 1997, p15.

But Friedman has made even further efforts to clear up the concept. He distinguishes between the legal culture of “those members of society who perform specialized legal tasks” and that of other citizens. The legal culture of legal professionals, which Friedman considers “specially important”, is “internal” legal culture. Contrasted with it is what he calls “external” legal culture.⁸⁷

Still Cotterrell is critical because the concept of culture *per se* is problematic for legal studies. He says: “Yet, in many circumstances, reliance on a general concept of ‘culture’ also makes problematic the theoretical identification of a specifically legal culture” because the “vague concept” “serves more of an artistic than a scientific function”.⁸⁸ So Cotterrell develops his own substitute concept for culture, suggesting “the concept of legal culture might best be replaced in most contexts of analysis by other concepts” and his recommendation for the replacement is what he calls “legal ideology”.⁸⁹

Legal ideology, according to Cotterrell, “can be considered to be ‘tied’ in a relatively specific way to legal doctrine” and “can be regarded as made up of value elements and cognitive ideas presupposed in, expressed through and shaped by the practices of developing, interpreting and applying legal doctrine within a legal system.”⁹⁰ Therefore, Cotterrell thinks his legal ideology is distinguished from Friedman’s concept of legal culture as follows:

“The concept of legal culture, at least in Friedman’s formulation, seems to focus most directly on a diversity of elements that exert influence *on* the production of ‘legal acts’ with legal systems and are held to explain differences in the character and orientation of these systems and their responsiveness to interests and demands. By contrast, analyses of legal ideology may present a more manageable theoretical task insofar as they explore mechanisms by which law, usually in the sense of the professionalized practices of state legal systems, exerts influence on, or translates and thereby helps reinforce, wider structures of values, beliefs and understandings”⁹¹

But Cotterrell’s efforts are attacked by Friedman, who declares: “The two terms (culture and ideology) strike me as equally vague and general”.⁹² Even Cotterrell himself has admitted that: “Like legal culture in Friedman’s formulation, legal ideology can be regarded not as a unity but rather as an overlay of currents of ideas, beliefs, values and attitudes embedded in, expressed through and shaped by practice.”⁹³ Both “unity” and “overlay” mean a *collection* of ideas, beliefs, etc. As a result, legal ideology inherits its vagueness from the prior concept of culture.

Neither Cotterrell nor Friedman can help us to make any substantial progress in making clear what the nature of culture exactly is, and the concept remains “equally vague and general”. There are perceptions of culture or legal culture by other scholars as well. For example, Grossfeld has a special chapter of “Culture and Law” in his *The Strength and Weakness of Comparative Law*. But in this chapter, he describes his perceptions of culture in very general terms: “Law is culture and culture is law”,⁹⁴

⁸⁷ Friedman, L.M., *The Legal System: A Social Science Perspective*, New York, Russell Sage Foundation, 1975, p194, p233.

⁸⁸ Cotterrell, “*The Concept of Legal Culture*”, *Comparing Legal Cultures*, Dartmouth, 1997, p37

⁸⁹ *Ibid.* p21.

⁹⁰ *Ibid.* p21-22.

⁹¹ *Ibid.* p23.

⁹² *Ibid.* p38.

⁹³ *Ibid.* p21.

⁹⁴ Grossfeld, *The Strength and Weakness of Comparative Law*, Clarendon Press, Oxford, 1990, p41.

which is even more vague and ambiguous. Professor Erhard Blankenburg from the Free University at Amsterdam takes “Civil litigation rates as indicators for legal cultures”.⁹⁵ But this is not theoretic exploration into the nature of legal culture and it is unclear just how many other indicators we could identify. Michel de Certeau in his *Culture in Plural* makes a list of six different interpretations and uses of the term culture.⁹⁶ However, they don’t seem either to be able to offer more help than Cotterrell and Friedman to obtain clearer understandings about the concept of culture.

In all the different understandings and perceptions I can find, the concept of culture seems to always have two characteristics: being general and being vague. Being general means that culture is always understood as something general or collective of a society. Being vague means that the concept can cover so many things that eventually you don’t know what it exactly refers to.

The definitions may vary in different ways, but they all share the same view of taking culture as a general or collective concept. Terms like “complex” of beliefs, “common” outlooks, ideas “typical” of the society, “overlay” of values, etc., are all expressions to show the general feature of the concept of culture. The generality of the concept may contribute to the vagueness of it. Because it is general, many different things can be put under the same title, hence the vagueness of the concept. As a result, it is often difficult to locate precisely the law-related cultural elements and consequently any specific claims about the interaction of law and culture remain arbitrary.

If we want to show how Chinese culture impeded the transplantation of the concept of marital rape we have to demand a clear and precise understanding of the nature of culture. Unfortunately this is not what current theories of culture can offer.

1.3 Review of literature on marital rape in China

Despite the methodological insufficiency and the conceptual deficiency, some attempts of a reflexive analysis do have been made in Chinese academic literature to explore the problem of marital rape.

Marital rape is quite a new topic to legal studies in China, which was seldom discussed before 1998. However, in 1997, a research paper by Professor Li Dun from the Chinese Academy of Social Science, *Relationship Between Individual Rights and Holistic Interests--- Analysis of Marital Rape in China from the Perspective of Sociology of Law*, was published in *China Social Science Quarterly* in Hong Kong.⁹⁷ This was a very early and rare piece of writing on marital rape in China and was therefore later re-published on China’s mainland in a few academic journals like *Cases and Judicial Interpretations of Criminal Law* when marital rape had become a nationwide hot topic.⁹⁸ The paper focuses on an empirical analysis based on 15 marital rape cases that Professor Li has collected, however, many of them were not legal cases.⁹⁹ Disputes in some of the cases were not settled in court. In some other

⁹⁵ Erhard Blankenburg, “Civil Litigation Rates as Indicators for Legal Cultures”, *Comparing Legal cultures*, Dartmouth, p41.

⁹⁶ De Certeau, *Culture in Plural*, Minneapolis & London : University of Minnesota Press, 1997, p103. Detailed discussions about the list will be in the last chapter of the thesis.

⁹⁷ Li Dun, “Relationship Between Individual Rights and Holistic Interests--- Analysis of Marital Rape in China from the Perspective of Sociology of Law”, *China Social Science Quarterly*, 1997, vol18-19.

⁹⁸ Li Dun, “Relationship Between Individual Rights and Holistic Interests--- Analysis of Marital Rape in China from the Perspective of Sociology of Law”, *Cases and Judicial Interpretations of Criminal Law* (XING SHI FA PAN JIE), vol.1 1999, p395

⁹⁹ Ibid.

cases, disputes were not settled at all in any form and the victims just had to choose to tolerate it.¹⁰⁰ Descriptions of some of the cases were only six or seven sentence-long recounts of the stories that happened and some did not even mention either the times or places or the names of the parties involved. Nevertheless, they do provide some valuable sociological insights, which are what Professor Li's studies pursue.¹⁰¹

The paper consists of five parts. The first part is *Introduction*, pointing out briefly that marital rape in China has different sociological meaning from that in other countries.¹⁰² The second part is the description of *Current Conditions* of marital rape as sociological facts, consisting mainly of the 15 cases.¹⁰³ The third part is *Interpretation of Law*, in which Professor Li argues that law can be understood only after it is interpreted by the dominating or mainstream culture in the society and this is why the current Chinese marital rape law cannot be applied in practice.¹⁰⁴ Then, in part four, *Background*, Professor Li explores the dominating culture behind marital rape in China. As he argues, in China, holistic interests are superior to individual rights, which is a governing principle applicable to both the families and the nation. The principle has even higher status than concrete laws. So, even though Chinese legislation does not exclude the husband from the subject of the crime of rape, the principle of holistic interests has in fact counteracted the effects of legal provisions in practice for the sake of the unity of the family or indeed the nation.¹⁰⁵ In the final part, *Problems in Change*, Professor Li looks into the future of marital rape law, claiming that feminism and other relevant ideas are changing the mainstream culture and the inner structure of Chinese law, which create greater awareness in the whole of society for women's personal rights.¹⁰⁶

After this work was published, several marital rape cases in late 1999 and 2000 attracted widespread attention, and marital rape became a widely and openly discussed topic in the whole of the country. The most important case was *Wang Weiming Rape Case* in Shanghai in 1999. This was the first marital rape case in Shanghai where the defendant was found guilty. The decision of the court came as a shock and heated discussions started on marital rape, which since then has become the most discussed legal problem in China's history of law.¹⁰⁷

The first result of the nationwide interest in marital rape is that the public media became very active in reporting marital rape cases. Once a new case takes place, prompt reporting in newspapers, magazines or on television and websites ensues,¹⁰⁸ in marked difference to the attitude of the media before. Public media also began to revisit old cases, offering more materials for the nationwide discussions.¹⁰⁹ As China is not a case law country and has no regular case reporting like the UK, this has

¹⁰⁰Ibid.

¹⁰¹Ibid.

¹⁰²Ibid.

¹⁰³Ibid.

¹⁰⁴Ibid.

¹⁰⁵Ibid.

¹⁰⁶Ibid.

¹⁰⁷ Xu Guojun, *On Marital Rape*, http://chinalawinfo.com/fzdt/pl_jdft.asp?id={1E0454CA-CBED-11D4-BFBB-00A0C9E97B51}

¹⁰⁸ *Procuratorial Daily* started on 16th November, 2000, the tracing reports on Wu Yaoxiong Case in Sichuan. *Beijing Evening* in 4th April 2001 reported the decision of the case ten days after it was made on 23rd March 2001. Ping Zhihong Case in Shanxi was reported only days after it ended on *Shanxi Commercial Daily* or websites like <http://www.unn.com.cn/GB/channel2200/2202/200109/13/105006.html>. The latest case in the thesis, Li Guo was settled 14 December 2003 and reported can be found on Jan. 8th 2004 on <http://society.qianlong.com/4330/2004/01/08/1320@1812537.htm>.

¹⁰⁹ Old cases like Cao in 1995, Jing in 1989, Chen in 1986, etc. were now also reported in newspapers like *Procuratorial Daily*, or their websites.

proved to be of valuable assistance in collecting empirical evidence for the study of the problem.

Apart from case reports, public media also invited lawyers, judges, sociologists, law scholars, etc. to give their comments on the cases as well as their opinions of marital rape as a legal problem. For example, Judge Wu Xiaofang from the Supreme Court wrote an article in *People's Court Daily* on 1st January, 2001.¹¹⁰ Dr. Fu Liqing from Beijing University gave his opinions in *Procuratorial Daily*.¹¹¹ *China Police Daily*,¹¹² *Beijing Evening News*¹¹³ and many other sections of the media also held special forums or discussions about marital rape problem.

The nationwide interests also promoted the academic research into the legal problem of marital rape. At the beginning of 2000, immediately following the *Wang Weiming* Case in Shanghai, one of the principal academic journals in Chinese legal studies, *Law Science* (FA XUE), held a special seminar, inviting experts from judiciary and academia to discussions on marital rape and making a special issue of the journal on marital rape in March 2000.¹¹⁴ Other academic journals like *Cases and Judicial Interpretations of Criminal Law* (XING SHI FA PAN JIE),¹¹⁵ and *Case Studies* (PAN LI YU YAN JIU)¹¹⁶, either set up special forum or published series of papers on marital rape.

The papers or articles by lawyers or academia may be classified into three groups. The first group explicitly and completely rejects the criminalization of marital rape. Examples are "*It's improper to criminalize marital rape*" by Liu Xianquan,¹¹⁷ "*Husbands' raping their wives are not criminal*" by Shi Meitang.¹¹⁸ Case comments by the Supreme Court on *Wang Weiming* Rape case and *Bai Junfeng* Rape case endorsed this view.¹¹⁹ Writers in this group establish their argument mainly on two grounds: legal and cultural. On legal grounds, they argue that a duty of cohabitation is already contained in marriage and by voluntary marriage the wife has already given the consent to sex with her husband. Therefore, sexual intercourse within marriage ought not to constitute the crime of rape.¹²⁰ On cultural grounds, they argue that law has to respect social context or local resources, and, while as the criminalization of marital rape is against traditional Chinese culture and family ethics, it is not a suitable legal concept in Chinese context.¹²¹

The second group is of those in support of the criminalization of marital rape. Examples are "*Jurisprudential research into marital rape*" by Professor Cai Daotong,¹²² "*On the nature marital rape---marital rape should be criminalized in China*" by Li Lizhong,¹²³ "*Husbands can rape their wives*" by Shen Liang,¹²⁴ "*Also on Marital Rape*" by Li Kai,¹²⁵ "*Jurisprudential Analysis on Marital Rape*" by Zhou

¹¹⁰ *People's Court Daily*, 1, November, 2001.

¹¹¹ *Procuratorial Daily*, 31, Jan. 2001.

¹¹² *China Police Daily*, 24, May, 2001.

¹¹³ *Beijing Evening News*, 4, Apr. 2001.

¹¹⁴ *Law Science* (FA XUE), Vol. 3, 2000.

¹¹⁵ *Cases and Judicial Interpretations of Criminal Law*(XING SHI FA PAN JIE) , vol.1, vol. 4, vol. 5.

¹¹⁶ *Case Studies*, (PAN LI YU YAN JIU), vol. 2.

¹¹⁷ *Law Science* (FA XUE), vol. 3, 2000.

¹¹⁸ *Ibid*.

¹¹⁹ *Reference to Criminal Trial*, vol. 3 in 1999 and vol. 2 in 2000.

¹²⁰ Liu Xianquan, "*It's Improper to Criminalize Marital Rape*"; Shi Meitang, "*Husbands' Raping Their Wives Are Not Criminal*", *Law Science* (FA XUE), vol. 3, 2000.

¹²¹ Supreme Court, "*Case Comment*"s, *Reference to Criminal Trial*, vol. 3 in 1999, p25.

¹²² *Criminal Law Review*, vol.10, China Politics and Law University Press, 2002, p499.

¹²³ *Journal of Chinese Criminal Law*, vol. 1, 2001.

¹²⁴ *Law Science* (FA XUE), vol. 3, 2000.

¹²⁵ *People's Adjudication*, vol. 12, 2000.

Yongkun,¹²⁶ and “*On Wang Weiming Rape Case*” by Zhou Qi and Hu Zhiguo.¹²⁷ This group also establishes their arguments on two grounds: law and the values of women’s rights. On legal grounds, they directly contradict the first group, claiming that marriage does not necessarily mean the duty of cohabitation or women’s irrevocable consent to sex and modern law proclaims woman’s equal status as a person with man. Since Chinese criminal law prescribes general subjects for the crime of rape, from which husbands are not excluded, the supposition that in law marriage necessarily entails women’s consent to sexual intercourse must be wrong.¹²⁸ Based on women’s rights notion, they argue it is a fundamental value of modern human society to recognize and protect the innate personal rights of women, which certainly include their rights of sexual self-determination. Therefore, marital rape, with no substantial different from ordinary rape, ought to be criminalized.¹²⁹

The third group of writers tries to make a compromise solution and hope to find a third way. Dr. Fu Liqing could be the representative of this group with his paper “*Marital Rape should wait---between to be and ought to be*”.¹³⁰ In this paper, Dr. Fu recognizes first that marital rape *ought to be* criminalized. However, due to the empirical factors in the current Chinese society, he eventually concludes that marital rape for the time being has to be decriminalized, at least partially.¹³¹ Among those who share the same opinions or arguments, we can also find “*Research on the localization of marital rape law*” by Zhou Huashan,¹³² and “*On feminism and post-colonism --- Rereading Chinese marital rape law*” by Zhou Huashan and Zhao Wenzong.¹³³ These writers first of all admit that the contemporary law in China, which, in essence, has the spirit of modern law, in fact, criminalizes marital rape. However, they also argue that traditional Chinese cultural factors like family ethics, which are incompatible with the criminalization of marital rape, retain their dominating power in current Chinese society. As a consequence, they argue that “air-dropped” reforms on marital rape law without caring about the present position of women in the patriarchal network of traditional family ethics fail to address the real problem.¹³⁴ They therefore propose gradual change of local resource before the actual change of law.¹³⁵ For the present stage, consequently, they either argue against the complete criminalization of marital rape or argue for the decriminalization of marital rape.

¹²⁶ *Law Science* (FA XUE), vol. 10, 2000.

¹²⁷ *Case Studies*, vol. 2, 2000, p20. Or the website: chinalawinfo.com/xin/disxwpl.asp?code=129&mark=1452 (2002/2/11)

¹²⁸ Li Kai points out in “*Also on Marital Rape*”, *People’s Adjudication*, vol. 12, 2000, that current criminal law of China has not excluded husbands from the subjects of the crime of rape. Shen Liang, in his “*Husbands Can Commit the Crimes of Rape on Their Wives*”, *Law Science*, vol. 3, 2000, has also arrived at his conclusions from analysis of current criminal law.

¹²⁹ Cai Daotong and Li Lizhong have both drawn their conclusions from premise of taking human rights as the universal and fundamental value for modern human beings. See “*Jurisprudential Research into Marital Rape*” by Cai Daotong in *Criminal Law Review*, vol.10, 2002, p499; “*On the Nature of Marital Rape---Marital Rape Should Be Criminalized in China*” by Li Lizhong in *Journal of Chinese Criminal Law*, vol. 1, 2001. See also: Awen, “*Marital Rape, the Unprosecuted Domestic Violence*” in *Law and Life*, vol. 12, 1999.

¹³⁰ *Cases and Judicial Interpretations of Criminal Law*, vol. 4. Or the website: chinalawinfo.com/xin/disxwpl.asp?code=129&mark=1504 (2002/2/11).

¹³¹ Fu Liqing, “*Marital Rape should wait---between to be and ought to be*”, chinalawinfo.com/xin/disxwpl.asp?code=129&mark=1504 (2002/2/11).

¹³² *Zhejiang Academic Journal*, vol. 2, 1999.

¹³³ *The Frontier of Law*, vol. 3, 1999.

¹³⁴ Zhou Huashan, “*Research on the Localization of Marital Rape Law*”, *Zhejiang Academic Journal*, vol. 2, 1999.

¹³⁵ Zhou Huashan and Zhao Wenzong “*On Feminism and Post-colonism --- Rereading Chinese Marital Rape Law*”, *The Frontier of Law*, vol. 3, 1999, p52-74.

1.4 Summary

We can now observe how the comparative law methodology and the concept of culture are applied in the arguments in the Chinese literatures on marital rape.

First of all, we see that cultural factors always play a significant role in the argument of all the writings above about marital rape law. Traditional Chinese belief in the principle of holistic interests is what Professor Li Dun found as the reason for the dilemma of marital rape law. The opponents of the criminalization of marital rape also base their conclusion on traditional Chinese cultural factors as essential arguments. The supporters, on the other hand, seem to strongly oppose the so-called *cultural* factors of traditional China as the argument for the decriminalization of marital rape. Instead they establish their argument for the criminalization of marital rape on what they tend to call the “universal and fundamental values of women’s human rights”. However, human rights notions is also a value system, which is of course covered by the concept of culture usually defined. So the supporters of the criminalization of marital rape also have cultural elements as their key arguments. For the third group, sadly, it is the conflicts between the two groups of cultural factors that force them to compromise on the legal problem of marital rape.

In the approaches employed by either the supporters or the opponents of the criminalization of marital rape, culture is always taken as a general concept as it usually is, just as we have seen in the previous review of various definitions of culture. In the culture approach thus employed, culture is always viewed as a positive and dominating entity in a society. Such an understanding of culture will easily result in the tendency for people to take certain category of cultural elements as arguments to draw their conclusions. So we find each side based on their category of cultural argument, opponents with Confucian ethics and supporters with women’s rights notions, arriving at their own conclusions about marital rape.

The so-called Mirror Theory has a basic sociological assumption, which states that a legal system in a society is decided by the social context in which the law develops.¹³⁶ In this sense, cultural factors can have the ultimate and ontological effects on the laws of that society. When the ultimate ontology is different, the law accordingly must be different. Therefore, with their opposing cultural arguments, supporters and opponents will naturally have opposing conclusions about the criminalization of marital rape.

Viewing culture as a positive and general entity also has effect on comparative law. As social context, which covers culture, is the ultimate ontology of laws, it is also the ultimate ontology for the comparison of laws in different societies. When the ultimate ontology is different, comparative law accordingly will lose its basic foundation for comparison. Eventually what the original implication of culture as positive and general entity leads to is the incomparability of culture-impacted laws in different legal systems. These problems in the methodology of current comparative law and the concept of culture have demonstrated themselves in the literature we’ve briefly seen, and will again in the detail introduction next about Chinese marital rape.

¹³⁶ See L. Friedman, *A History of American Law*, (Simon & Schuster, 1973), 595: “if by law one means an organized system of social control, any society of any size and complexity has law. ... The law is a mirror held up against life. It is order: it is justice; ... it is whatever results from the scheming, plotting, and striving of people and groups, with and against each other”.

Chapter 2 Marital Rape in China ---

empirical data

This chapter provides pure descriptive empirical data of marital rape problems in China, which cover legislations, judicial practices, debates of law people and attitudes of lay people.

2.1 Legislations in China concerning marital rape

The crime of rape has had a long history. It would be impossible to achieve a proper understanding about current marital rape problem in China without the necessary historical knowledge of the development and evolution of the crime of rape in general in the Chinese legal tradition.

2.1.1 Brief history

Due to the stable and long-lasting continuity of Chinese civilization, attitudes toward sexual relations within marriage have not changed much, either legally or ethically, for thousands of years since the establishment of the dominance of the Confucianism in Han Dynasty around 60 BC to the early stage of the last dynasty of Qing before 1840s.¹³⁷ Due to traditional Chinese ethics' incompatibility with the concept of marital rape, in the time prior to Qing Dynasty, including the earlier Qing, it was not likely for any traditional Chinese codes of any dynasties before 19th century to have the law with the possible capacity to criminalize marital rape. Here I take the earlier Qing Code, DA QING LV LI, which could represent other codes in feudalist China, as the example for the study of the attitude of traditional Chinese law towards marital rape.

1 Early Qing and before

DA QING LV LI is the last feudalist code in China. From the start of its compilation in 1644 to its promulgation in 1740, it took about a century to be completed.¹³⁸ Therefore DA QING LV LI is now thought to have taken the merits and achievements of the preceding two thousand years experience of legislative and judicial practices of China, well epitomizing the feudalist Chinese codes and containing a significant position in Chinese legal history and legal culture.¹³⁹

Traditionally, a feudalist Chinese code contains different branches of law, with rules of criminal law, civil law, administrative law, etc., coexisting in the same code. In DA QING LV LI, we can therefore find both the criminal and the civil provisions concerning marriage and rape.

¹³⁷ Wu Changzhen, *Marriage Law and Me*, Law Press, 2001, p3-4.

¹³⁸ Wang Limin, *The History of Chinese Law*, China Finance and Economy Press, 2001, p391-392.

¹³⁹ Foreword in DA QING LV LI, Tianjin Guji Press, 1993, p1

The FAN JIAN volume of the 1740 DA QING LV LI is a special category of the crimes of FAN JIAN, or, literally, JIAN offenses.¹⁴⁰ This volume contains ten articles giving more detailed prescriptions of different JIAN offenses.¹⁴¹ The Chinese word JIAN literally means the “unlawful or illicit sexual relations”, which in traditional Chinese context referred only to extramarital sexual relations.¹⁴²

Under the broad category of FAN JIAN, we find the following different JIAN offenses:

DIAO JIAN: referring to the action of a man who knows of an unlawful action of a woman and therefore uses it as the threat or coercion to force her to have a sexual relation with him.

HE JIAN: referring to the action of a man and a woman to have unlawful sexual relation with her consent.

TONG JIAN: referring to the unlawful sexual relation between a man and a woman introduced by the third party.

QIANG JIAN: referring to the coercive action of a man to force a woman to have unlawful sexual relation with him.¹⁴³

Among the JIAN offenses, QIANG JIAN is what is the equivalent in Chinese language to the English term “rape”. In the Chinese equivalent, QIANG means “coercive” while JIAN, as previously said, means “unlawful or illicit sexual relations”. Therefore the term QIANG JIAN literally means the “coercive and unlawful sexual relations”. With its “unlawful” nature, QIAN JIAN, or rape in traditional Chinese context, has an obvious sense of being extramarital.

The extramarital nature of rape in DA QING LV LI can also be confirmed by the structure of the code concerning rape. Rape is placed under the broad category of FAN JIAN as one concrete form of various JIAN offenses.¹⁴⁴ But all the offenses in the special FAN JIAN volume in DA QING LV LI are extramarital in nature. And QIANG JIAN differs from other JIAN offenses by that:

The crime of QIANG JIAN (rape) is established only in the situation that force is used and the woman cannot get away from it, with other people hearing the screaming and shouting, or physical injuries or torn-out clothes or other proofs of the kind.¹⁴⁵

In the contrast to other JIAN offenses, rape in traditional Chinese law distinguished itself only with its forceful and coercive means. However, they all belong to the general category of JIAN, which were the unlawful extramarital sexual relations not legitimated by law, morality, ethics or customs. Therefore, QIANG JIAN, or rape, in DA QING LV LI, as one form of JIAN, referred to only the coercive sexual relations beyond marriage. And coercive sexual actions of the husband against his wife cannot be included in the crime of QIANG JIAN or rape. So, from the criminal law perspective, marital rape is not a concept sensible to DA QING LV LI.

¹⁴⁰ Yao Yuxiang, DA QING LV LI HUI TONG XIN ZUAN (*Collections of Amendments and Compilation of DA QING LV LI*), Wenhai Publishing House, Taipei, 1964, p3197-3224.

¹⁴¹ Ibid.

¹⁴² Li Shunzhang, “New Perspective on Marital Rape Problem”, *Cases and Judicial Interpretations of Criminal Law*, vol. 5, p455.

¹⁴³ Yao Yuxiang, DA QING LV LI HUI TONG XIN ZUAN (*The New Edition of DA QING LV LI*), Wenhai Publishing House, Taipei, 1964, p3197-3224.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

From the family law perspective, husbands and wives were not equal in their sexual relations. All the traditional Chinese codes, including DA QING LV LI, explicitly allow the polygamy.¹⁴⁶ A man could legally marry many women and a woman could not marry many men. Those women married to one man were not legally equals either. One of the women enjoyed a higher status, who was known as QI or wife, while the other women with lower legal status were known as QIE or concubines. The Marriage Law volume of DA QING LV LI has in its third article the special provision of the punishments for the violation of the legal relationships between the wife and the concubines.¹⁴⁷ However, given that only men, not any women, could have more than one legitimate sexual partners, even the wife, the woman with higher legal status than the concubines, did not have equal rights with her husband in terms of their sexual relations. Therefore, under such a polygamy system, the right/duty of sex between husband and wife is one-sided, with the rights always on the husband's side and duties always on the wife's side.

Following examples may show to what extent the sexual inequality between husband and wife could go in early Qing law. In DA QING LV LI, for example, on the one hand, the polygamy system exempted men's duty to be sexually loyal to their wife or concubines by granting husbands the rights to have many sexual partners. The law, on the other hand, prescribed the duty of wives to preserve chastity even after the death of their husbands, not to remarry and not to have sex with any other men.¹⁴⁸

LI BU ZE LI are special regulations concerning marriage and family life, which prescribe the duties that women ought to follow in order to be virtuous. The law provides that, in case the husband died before she was thirty, a virtuous wife should have preserved chastity after the death of her husband from before her thirty years of age to fifty years of age. And if she died before fifty years old, the wife should have preserved chastity for not less than ten years after the death of her husband in order to be legally virtuous.¹⁴⁹ Later, the *Collections of Amendments and Compilation of DA QING LV LI* cited the LI BU ZE LI, providing that the sovereign would honor those women who had met the above requirements.¹⁵⁰ With the honors from the sovereign and the citations of the formal Code, chastity preservation after the death of husbands had practically become the legal duty of women, making wives a complete sexual dependent and granting husbands complete domination over their wives in their sexual relations.¹⁵¹

But this has not been all of it. Laws in early Qing did much more than morally encouraging wives' sexual dependence upon their husbands. DA QING LV LI actually explicitly allows husbands to mortgage their wives or concubines to other men. In the first years of Qing Dynasty, the law prohibited the mortgage of wives and concubines, prescribing eighty strokes of bamboo sticks for the offenders.¹⁵² However, in 1646, a note was added to the article concerned, providing that only those who made formal contracts for such mortgages would be punished while those mortgaged their wives and concubines privately would not.¹⁵³ Wife mortgaging was

¹⁴⁶ Wu Changzhen, *Marriage Law and Me*, Law Press, 2001, p5.

¹⁴⁷ Yao Yuxiang, DA QING LV LI HUI TONG XIN ZUAN, Wenhai Publishing House, Taipei, 1964, p1025-1026.

¹⁴⁸ Yao Yuxiang, DA QING LV LI HUI TONG XIN ZUAN, Wenhai Publishing House, Taipei, 1964, p1017.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ Zhang Jinfan, *Comprehensive Studies of Civil Laws in Qing Dynasty* (QING DAI MIN FA ZONG LUN), China Politics and Law University Press, 1998, p217.

¹⁵² Ibid.

¹⁵³ "Those who, for the purpose of property or profit, mortgage (in formal contracts) their wives or concubines to other men as wives or concubines, shall receive eighty strokes of bamboo sticks. Those who rent the women shall receive sixty strokes of bamboo sticks. The women shall be acquitted." See: Yao Yuxiang, DA QING LV LI HUI

quite common among the low class people in Qing Dynasty and the provisions in DA QING LV LI thus actually recognized these mortgages. Under such legal prescriptions, the sexual rights and other personal rights of the wives are mere possessions of the husbands, which the husbands could mortgage or dispose like a possession. Such prescriptions are the clear proof of the husbands' absolute and monopoly rights of sex over their wives. Under such circumstances, sexual intercourse is the absolute duty of the wife to her husband and therefore the husband's coercive sex with their wives was not problematic. Accordingly, the concept of marital rape was impossible under such a family law system.

2 Late Qing

It was not until the end of Qing Dynasty in late 19th century, when the Chinese were forced to open their door to the west after the invasion by the British, that the legal status of the Chinese women started to be changed under the influences of western legal cultures.¹⁵⁴ The legal reforms at the turn of the century around 1900 are of significant importance in the Chinese legal history. It is now usually thought to be the starting point of the modern law in China.¹⁵⁵

In 1910, the Revised Qing Code, DA QING XIN XING LV (*The New Criminal Code of the Great Qing*), was promulgated. It is thought to be the first modern criminal code in China in which different legal branches are no longer mingled together. Instead, criminal law, civil law and procedural law have become separate and independent legal codes.¹⁵⁶ In the Revised Code, some significant changes were made in the JIAN offenses. For example, the sexual relation of an unmarried woman with a man is no longer a crime while only the sexual relation of a married woman with other man is prescribed as a crime.

CHAPTER 23 JIAN OFFENSES AND BIGAMY

*Article 283 Those who have sexual relations with married women (HE JIAN) shall be punished with fourth rate or lower fixed-term imprisonment or detention. The other party of the offense shall be subject to the same punishment.*¹⁵⁷

This provision decriminalized the sexual relations with unmarried women, which had been criminalized for thousands of years in China. Thus, this tremendous change was one of the first steps of Chinese law to free women from their absolute inferior legal status that had lasted for thousands of years, and therefore aroused radical controversies between the reformers and the conservatives.¹⁵⁸

TONG XIN ZUAN, Wenhai Publishing House, Taipei, 1964, p1021.

¹⁵⁴ Li Xiandong, *From DA QING LV LI to the Civil Code of the Republic of China*, China People's Police University Press, 2003, p99.

¹⁵⁵ Ibid.

¹⁵⁶ Huai Xiaofeng, *The History of Chinese Law*, China Politics and Law University Press, 1998, p438.

¹⁵⁷ DA QING XIN XING LV (*The New Criminal Code of Great Qing*), printed by XIAN ZHENG BIAN CHA GUAN (Constitution Publishing House), 1910, p47.

¹⁵⁸ Under the pressure from the opponents of the decriminalization, temporary provisions were added to DA QING XIN XING LV when promulgated: "*Article 4: If an unmarried women has committed the crime prescribed in Article 283, she shall be punished with fifth rate fixed-term imprisonment, or detention or fine of no more than one hundred yuan. The other party of the offense shall be subject to the same punishment. There shall be no trial on the said offense without complaints from senior relatives of lineal kinship. There shall be no trial on the said offense even with complaints if the senior relatives of lineal kinship have winked the act in advance or have reached private settlement for profit after the act. Note: there are no provisions in the newly promulgated codes in all other countries for the punishments of unlawful sexual relations with unmarried women. The prevention of such acts shall lie in education not criminal penalties. However, given that such modern education has not yet been well established in China, temporary penalties are hereby prescribed according to the traditional laws*". See page 2 of the attached "Temporary Provisions" of DA QING XIN XING LV, printed by XIAN ZHENG BIAN CHA GUAN

However radical these changes might have been, they did not make any difference to either the legal status of the married women or people's understanding of the legal concept of rape. Rape in DA QING XIN XING LV was still proscribed in Chapter 23 of JIAN Offenses and Bigamy together with other JIAN offenses.¹⁵⁹

CHAPTER 23 JIAN OFFENSES AND BIGAMY

*Article 279 Those who render resistance impossible by threats or violence, by administering drugs, by inducing hypnosis, or other means so as to have carnal relations with female persons shall be considered to have committed rape and shall be punished with first or second rate fixed-term imprisonment.*¹⁶⁰

Under such a structure arrangement of the Code, rape was still one form of the JIAN offenses, which as a category took the original literal meaning of the extramarital-nature of the character 奸 (JIAN). The substantive contents of rape were not redefined, instead, like all the JIAN offenses, the crime of rape was committed only in extramarital situations. So, in this Revised Qing Code, the legislative status of women may have seen improvements more or less, but the concept of marital rape was still impossible.

For family law, DA QING MI LV CAO AN, or *the Draft of the Civil Code of Great Qing*, was made in 1911. Though it never had the chance to be promulgated due to the breakout of the 1911 Revolution, it well reflected the legislative thoughts at the time and also became the main source of Chinese civil law afterwards in the MINGUO period, or the Republic of China.¹⁶¹ Consequently, it is now regarded as the first modern civil code in China. There has been much study of this draft, which could also reveal the development of the women's legal status in Chinese legislation.

The draft still does not, in principle, take wives as equal persons with their husbands.

*Article 9: A person who has reached majority and has the capacity of discernment has the disposing capacity, but wives are not included.*¹⁶²

And the more specified prescription of wives' capacity is in article 26.

*Article 26: The disposing capacity of a wife is limited in accordance with the following four articles.*¹⁶³

And the following four articles:

Article 27: Acts that are not of daily housework need to be approved by the husband.

(Constitution Publishing House), 1910. Cultural conflicts have played an obvious role here in the Revised Qing Code. More discussions about the controversies on DA QING XIN XING LV can be found in Chapter 3.

¹⁵⁹ Chapter 23 (Article 277 – 289) in DA QING XIN XING LV, printed by XIAN ZHENG BIAN CHA GUAN (Constitution Publishing House), 1910, p45-47.

¹⁶⁰ DA QING XIN XING LV, printed by XIAN ZHENG BIAN CHA GUAN (Constitution Publishing House), 1910, p46.

¹⁶¹ Li Xiandong, *From DA QING LV LI to the Civil Code of the Republic of China*, China People's Police University Press, 2003, p180-186.

¹⁶² DA QING MIN LV CAO AN. See Yang Lixin, *DA QING MIN LV CAO AN HE MIN GUO MIN LV CAO AN (The Draft of the Civil Code of the Great Qing and the Draft of the Civil Code of the Republic of China)*, Jilin People's Publishing House, 2002, p4.

¹⁶³ *Ibid.* p5.

Article 28: With the approval of the husband, wife may operate one or more businesses independently. ... Husband may void or limit such approval.

Article 29: When husband is minor, he may not approve his wife's acts without the agreement of his guardians.

Article 30: Husband's approval is not necessary in the following cases:

Husband and wife have conflicting interests

Husband deserts his wife

Husband is an interdicted person or quasi-interdicted person

Husband is under the execution of sentence of more than one year's imprisonment.¹⁶⁴

The above prescriptions have decided as the general principle of the draft wives' inferior status to their husbands. And we can go on to see more specific prescriptions concerning marriage and their sexual relations.

First, we see that, in this draft, polygamy was still not abolished by law.

Article 1403: A SISHENGZI, or illegitimate child, is the child born out of unlawful sexual relations or void marriage.¹⁶⁵

At the meantime, the draft had another article:

Article 1387: A SHUZI is the child born by the women other than the wife.¹⁶⁶

By distinguishing SISHENZI and SHUZI, the draft recognized that a man could have, other than his wife, more women of legitimate marital relations with him. Obviously polygamy was still allowed here in the draft. As previously shown, the existence of polygamy *per se* means nothing but the unequal sexual relations between husbands and wives. And the inequality can be further confirmed by further articles in the draft.

Article 1350: Husbands should make the wives cohabit with him and wives have the duty to cohabit with their husbands.

Article 1351 Cohabitation affairs are up to the decision of the husbands.¹⁶⁷

Sex is a major content of the duty of cohabitation. With the dominating rights upon cohabitation affairs prescribed by the above two articles, husbands would have the rights to be in the dominant position in their sex life. Consequently, wives would not have the right of sexual self-determination, without which marital rape was a senseless concept.

The article about reasons for divorces could be another evidence for the unequal sexual relations between husbands and wives:

Article 1362 Either of the husband and wife can institute a legal proceeding for divorce on the following grounds:

.....

2. The wife conducted adultery;¹⁶⁸

¹⁶⁴ Ibid. p5-6.

¹⁶⁵ Ibid. p179.

¹⁶⁶ Ibid. p177.

¹⁶⁷ Ibid. p173.

.....

Adultery as the ground for divorce was limited only to wife as the perpetrator and the draft did not make adultery conducted by husbands the ground for divorce. This means the one-sided legal duty of the wife to be sexually loyal to the husband and the husband did not have the legal duty to be sexually loyal to the wife. These provisions show that marital rape was still a concept incompatible with the law of family and marriage in the time of late Qing. With the incompatibility with criminal law as well, marital rape was still an impossible concept at the time.

3 LIU FA QUAN SHU

After the foundation of the Republic of China in 1911, a more modern legal system than that of the revised Qing Code was gradually established, which is now usually known as the LIU FA, or the Six Laws, including the constitution, the civil, criminal, civil procedure, criminal procedure and administrative laws.¹⁶⁹ The criminal code of the Republic of China was promulgated in 1928 and the laws of marriage, family, maintenance were promulgated in 1929.

The 1928 Republican criminal code provides:

CHAPTER XVI OFFENCES AGAINST MORALS

*Article 221 A person who renders resistance impossible by threats or violence, by administering drugs, by inducing hypnosis, or other means and who has carnal relations with a female person shall be considered to have committed rape and shall be punished with imprisonment for not less than five years.*¹⁷⁰

We can easily notice two differences of the provision of rape in the Republican code from the previous codes. First is a structural difference. The crime of rape, or QIANG JIAN, is no longer put in under a category of JIAN offenses but as an independent crime put together with other non-sexual offenses under the category of offences against morals. By this structural change, rape, or QIANG JIAN, at the Republican time was no longer regarded as one of the JIAN offenses and therefore did not necessarily share the literal meaning of JIAN, which determines the extramarital nature of JIAN offences. It would be reluctant now even in Chinese context to insist that rape, QIANG JIAN, was still necessarily extramarital in nature.

The second difference is the explicit special redefinition of rape, which eliminates the extramarital-nature of rape completely. Article 221 of the 1928 Code makes a special legal proposition to give the explicit legal definition for the concept of rape, with precise prescription of what rape refers to exactly. By such a special definition, rape, QIANG JIAN, in the Republican law no longer simply has the literal meaning of the word(s) in everyday language as the Qing codes did.

However, even today, some people are still denying the concept of marital rape on the linguistic ground, saying that since the Chinese term for rape, QIANG JIAN, contains the word JIAN, which traditionally has the literal meaning of being extramarital, marital rape is therefore an illogical concept.¹⁷¹ Such an argument can be

¹⁶⁸ Ibid. p174.

¹⁶⁹ Some people insist a different version of the Six Laws, with commercial law taking the place of administrative law. See: Wan Limin, *The History of Chinese Law*, China Finance & Economy Press, 2001, p504.

¹⁷⁰ Major Laws of the Republic of China (LIU FA QUAN SHU). See, *Major Laws of The Republic of China on Taiwan*, Magnificent Publishing Co. Tainan, 1991, p1091.

¹⁷¹ See: Zhang Xianyu, "On No Rape in Marriage", *Law Science*, vol. 3, 2000, p55; Liu Xianquan, "It's Improper to Criminalize Marital Rape", *Law Science*, vol. 3, 2000, p58-59.

easily refuted for its lack of understanding of Chinese language. Actually, it is common that the literal meaning of a Chinese character changes, and sometimes dramatically. For example, Chinese character for “word” is 字ZI, whose original meaning was “milk”, “love or to love” “to bring up or to give birth to a child”.¹⁷² The original meanings of ZI seem to have nothing to do with its present one, and are rarely known by the ordinary people today.

Also, if strictly literal, the word JIAN, if sufficiently original, may not have had the unlawful or extramarital meaning either. SHUO WEN JIE ZI is the special dictionary into the original meanings of each Chinese character, compiled by Xu Shen two thousand years ago in the Han Dynasty. According to the authoritative dictionary, the literal meaning of the character JIAN came from the word “do” and the word “woman” (CONG GAN NV WEI YI).¹⁷³ Such a literal meaning can refer to any actions to “do with a woman”, which therefore is rather neutral and value free. Thus the above linguistic argument against the concept of marital rape is ill-grounded, and the traditional literal meaning of the word JIAN could no longer have preserved the extramarital-nature of rape in Chinese context since the special definition in the 1928 code.

With the special legal definition of rape, we know that, according to the provision, rape refers to the action of any “*person who renders resistance impossible by threats or violence, by administering drugs, by inducing hypnosis, or other means and who has carnal relations with a female person*”. The provision did not make marriage an exemption or stipulated it as special in any sense. Therefore, spoken from at least this provision of the Republican law, marital rape is a crime conceptually.

However, the 1928 Code also provides:

*Article 256: Whoever, being a woman, whose husband is living, commits adultery with any person, shall be punished with imprisonment for a term of not more than two years.*¹⁷⁴

Obviously, this provision shows that the Republican law still took sex as the necessary duty of a married woman to her husband. But the right seemed to lie only on the husband’s side while the wife had only the duty because we cannot find any article providing or implying the same duty for husbands. As a result, marriage gave the husband the one-sided right of sex over his wife. If the wife had sexual relations with anyone other than her husband, it would be a severe infringement of his right. Consequently the wife would be criminally punished.

The notion contained in this provision of taking sex as the necessary part of the marital rights in the husband’s favour was in accordance with the Republican family law. The Republican law of family, in contrast to the Qing Code, rejected, as a principle, the hierarchical relations between men and women, prescribing that as a “natural person”, a woman possessed the same rights and obligations as a man.¹⁷⁵ The gender equality principle may have laid down the fundamental legislative base for the possible marital rape law.

However, the Republican civil code stipulates that husbands and wives have a “mutual obligation” to live together.

¹⁷² Xu Shen, SHUO WEN JIE ZI. See SHUO WEN JIE ZI GU LIN, Taipei, 1966, vol. 10, p6601.

¹⁷³ The character JIAN has a right/left structure. The right part is the character “women” and the left part is the character “do”. See: SHUO WEN JIE ZI GU LIN, Taipei, 1966, vol. 10, p5645.

¹⁷⁴ Guo Weixiao, *Current Major Laws of The Republic of China* (ZHONG HUA MIN GUO XIAN XING LIU FA QUAN SHU), Shanghai Translating and Editing House, 1930, p330.

¹⁷⁵ Chapter 2 “Persons”, Book I “General Principle”. Ibid. p2-3.

Article 1001 Husband and wife are under mutual obligation to live together, unless for good reason they cannot live together.

*Article 1002 A wife takes the domicile of the husband as her domicile.*¹⁷⁶

Though Art. 1001 prescribes the obligation to live together as “mutual”, Art. 1002’s prescription factually damaged the equality of the mutual obligation. According to Huang, these provisions have actually expanded husband’s rights, even compared with the Qing Code:

“Under the civil code, spouses had the mutual obligation to live together. This represented in theory somewhat expanded rights for husbands; in the Qing, they could only resort to trumped-up charges of desertion, since the law did not contain any stipulation against a woman’s returning to her natal home for long periods. Now husbands could appeal to the courts on the grounds of their wives’ obligation to live with them”.¹⁷⁷

So, while, in the Qing, abused or unhappy wives still had the common resort of taking refuge with their natal families, husbands in the Republic had the legal tool to force their wives home. Despite the general principle of gender equality, concrete provisions of the Republican laws were still male-centric, giving the husbands the substantially superior status over their wives. Thus, even after the concept of rape had been redefined, the inconsistency inside the legal system resulted in that marital rape in practice couldn’t be a legislative crime.

However, legislation afterwards saw a constant process of changes and revisions. The legislative inconsistency was eliminated in some degree shortly after the promulgation of the 1928 criminal code, in 1935, with the Article 256 in the code revised as:

*Article 239 A married person who commits adultery with another shall be punished with imprisonment for not more than one year; the other party to the adultery shall be subject to the same punishment*¹⁷⁸.

Now both the husband and the wife could commit the crime of adultery, therefore, it came closer to gender equality in terms of the sex rights. And this was more consistent with the adultery article in the 1929-30 civil code, which made adultery on the part of either party acceptable grounds for divorce.

Article 1052 Either spouse may apply to the Court for a divorce provided that one of the following conditions exist:

- 1. Where the other spouse has committed bigamy.*
- 2. Where the other spouse has sexual intercourse with another person*¹⁷⁹

.....

¹⁷⁶ Major Laws of the Republic of China (LIU FA QUAN SHU). See, *Major Laws of The Republic of China on Taiwan*, Magnificent Publishing Co. Tainan, 1991, p301.

¹⁷⁷ Philip Huang, *Code, Custom, and Legal Practice in China*, Stanford University Press, p185.

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¹⁷⁹ Major Laws of the Republic of China (LIU FA QUAN SHU). See, *Major Laws of The Republic of China on Taiwan*, Magnificent Publishing Co. Tainan, 1991, p314.

With the stronger emphasis on gender equality and sex as personality rights, the revisions and developments of the laws demonstrated a gradual process in legislation, whose final trend would be to make the legislative criminalization of marital rape more and more likely.

2.1.2 Current legislation

In 1949, with the military victories of the Communist Party, the Republic of China was succeeded by the People's Republic of China, and the established legal systems in the Republican period were completely abolished for political reasons. A great discontinuity followed soon after. But from 1970s, the Communist government picked up again the effort to establish the new Chinese legal system, which is the current one in operation on China's mainland.

1. The Criminal Law of the People's Republic of China

The current criminal law of the People's Republic of China was passed in the People's Congress in 1979, revised in 1997 and promulgated on March 14th, 1997.

The Criminal Law defines rape as follows:

Chapter IV Crimes of Infringing upon Citizen's Right of the Person and Democratic Rights

*Art. 236 Whoever rapes a woman by violence, coercion or any other means shall be sentenced to fixed-term imprisonment of not less than three years but not more than 10 years.*¹⁸⁰

Compared with the 1928 Republican code, the current criminal law moves the crime of rape from the "Offences against morals" to the chapter of "Offences against personal rights". This change is an evident proof of the change in the substantial connotation of the legal concept of QIANG JIAN, or rape.

Since what rape, or QIANG JIAN, as the coercive sexual action, now violates is not the social morals or family ethics but the personal rights of women, therefore, any action against the women's personal rights of sexual self-determination can be the crime of rape. This, in turn, means two things: first, it confirms the substantial change in legislation of the connotation of the legal concept of QIANG JIAN. The current legal concept of rape in Chinese context, QIANG JIAN, is no longer based on the more fundamental category of JIAN, referring to only the unlawful sexual relation outside of marriage, but based the violation of the personal rights of the women. So, with the substantial redefinition of rape by legislation, marriage is excluded from the exemption to commit the crime of rape.

Secondly, it means more concrete application than the Republican law of the gender equality in terms of sexual relations. Men and women as equal persons had already been laid down as a principle by the 1928 and 1929 Republican laws. But what rape violated at that time were public morals not personal rights. The marriage exemption of rape therefore could be justified on family ethics even under the gender equality principle. However, by recognizing rape as offenses against personal rights, current criminal law has actually recognized that any coercive sexual actions against the women's will, whether there is a marriage or not, are not legitimated by law because equal persons certainly have equal rights of sexual self-determination.

¹⁸⁰ *Criminal Law of the People's Republic of China*, Chinese Legal System Publishing House, p203.

Article 1001 Husband and wife are under mutual obligation to live together, unless for good reason they cannot live together.

*Article 1002 A wife takes the domicile of the husband as her domicile.*¹⁷⁶

Though Art. 1001 prescribes the obligation to live together as “mutual”, Art. 1002’s prescription factually damaged the equality of the mutual obligation. According to Huang, these provisions have actually expanded husband’s rights, even compared with the Qing Code:

“Under the civil code, spouses had the mutual obligation to live together. This represented in theory somewhat expanded rights for husbands; in the Qing, they could only resort to trumped-up charges of desertion, since the law did not contain any stipulation against a woman’s returning to her natal home for long periods. Now husbands could appeal to the courts on the grounds of their wives’ obligation to live with them”.¹⁷⁷

So, while, in the Qing, abused or unhappy wives still had the common resort of taking refuge with their natal families, husbands in the Republic had the legal tool to force their wives home. Despite the general principle of gender equality, concrete provisions of the Republican laws were still male-centric, giving the husbands the substantially superior status over their wives. Thus, even after the concept of rape had been redefined, the inconsistency inside the legal system resulted in that marital rape in practice couldn’t be a legislative crime.

However, legislation afterwards saw a constant process of changes and revisions. The legislative inconsistency was eliminated in some degree shortly after the promulgation of the 1928 criminal code, in 1935, with the Article 256 in the code revised as:

*Article 239 A married person who commits adultery with another shall be punished with imprisonment for not more than one year; the other party to the adultery shall be subject to the same punishment*¹⁷⁸.

Now both the husband and the wife could commit the crime of adultery, therefore, it came closer to gender equality in terms of the sex rights. And this was more consistent with the adultery article in the 1929-30 civil code, which made adultery on the part of either party acceptable grounds for divorce.

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¹⁸⁰ *Criminal Law of the People's Republic of China*, Chinese Legal System Publishing House, p203.

Also from the letters of this article we know that, according to the present Criminal Law, rape is any forcible act to have sex against the will of the woman by violence, coercion or any other means. The subject of the crime is a general subject; a husband, who is a person with criminal capacity, can of course be the subject of the crime of rape.

Neither the Supreme Court nor the Legislature has given any further commentary concerning with the strict definition of rape and its relation with marital rape. However, judges, lawyers and scholars have reached a general agreement about the definition of rape in the article. As Judge Wu Xiaofang from Supreme Court says: "According to the Criminal Law, rape is the act of having sex against the will of the woman by violence, coercion or other means. The key element to decide the establishment of rape is whether the act is against the will of the woman or not. The law does not exclude wives from the possible victims."¹⁸¹ A husband can, therefore, commit the crime of rape on his wife. Judge Cheng Dongning, the vice president of Gaoyou Municipal People's Court, Jiangsu Province, said: "The crime of rape literally defined in the present Criminal Law in our country indicates the inviolability of women's rights of sexual self-determination. Any sexual act against the will of a woman constitutes the crime of rape."¹⁸²

So, the current Chinese criminal code has already had the capacity to cover marital rape as the crime of rape. And the legislative criminalization of marital rape in present China would be further affirmed if we take a look at the equivalent articles in western codes.

In the west, before the criminalization of marital rape, codes used to write out explicitly the "extramarital" character of the concept of rape.

The 1871 German Penal Code provided:

Article 177 Rape

*1. Anybody who by force or threat of immediate bodily harm forces a woman to submit to extra-marital sexual intercourse or who misuses a woman for extra-marital sexual intercourse ...*¹⁸³

According to the English Sexual Offences (Amendment) Act 1976, s.1(1):

"... a man commits rape if:

*a) he has **unlawful** sexual intercourse with a woman who at the time of the intercourse does not consent to it"*¹⁸⁴

The word "unlawful" in this English Act is usually understood as the meaning of being extramarital just the same as the explicit word of "extra-marital" in the German Code. When marital rape was criminalized, the corresponding changes in these western codes were to cross out the words limiting the concept of rape to only the

¹⁸¹ Wu Xiaofang, "Consortium & Marital Rape", People's Court Daily, 1st Nov. 2000.

¹⁸² <http://www.peopledaily.co.jp/GB/shenghuo/76/123/20010405/433792.html>.

¹⁸³ *The German Penal Code of 1871*, Sweet & Maxwell Limited. London, 1961, p103.

¹⁸⁴ 'Current Law' Statutes, Sweet & Maxwell, Stevens & Sons, W. Green & Son, 1976, 82/1.

http://uk.westlaw.com/search/default.wl?Action=Search&EQ=Welcome%2FWestlawUK&Query=TI%28sexual+%2F3+offences+%2F3+act+%2F3+1956%29&Method=TNC&DB=UK%2DLIF&RP=%2Fwelcome%2FBuilders%2FUKLegBuilder%2Ewl&RS=WLUK4.02&VR=2.0&SPa=ukedinb-000&SV=Split&FN=_top&MT=WestlawUK&TempInfo=%7CtxtActSINameSEXUAL+OFFENCES++ACT+1956%7CTEMPLATEUKTMPLTUK

“extramarital” cases so as to expand the range of subjects of the crime to cover the husbands.

For example in England, in the well-known case *R. v. R.*, the court suggested that the word “unlawful” in section 1(1) of the Act of 1976 is mere surplusage and should be ignored.¹⁸⁵ And, in the English Criminal Justice and Public Order Act 1994, the law was changed to:

“(2) *A man commits rape if—*

(a) he has sexual intercourse with a person (whether vaginal or anal) who at the time of the intercourse does not consent to it; ...”¹⁸⁶

By deleting the word “unlawful”, the criminalization of marital rape was established in English Law. Similar things took place in German law as well. The German legislators just omitted the word “extramarital”, which marked out the extramarital character of rape in the past, making the current law, promulgated on 13 November 1998, as:

Section 177 Sexual Coercion; Rape

(1) Whoever coerces another person:

1. with force;

2. by a threat of imminent danger to life or limb; or

3. by exploiting a situation in which the victim is unprotected and at the mercy of the perpetrator's influence,

*to suffer the commission of sexual acts of the perpetrator or a third person on himself or to commit them on the perpetrator or a third person, shall be punished with imprisonment for not less than one year.*¹⁸⁷

This is the same effects that the language in the current Chinese criminal law has achieved. Due to the linguistic differences, traditional Chinese laws did not need to use special words to exclude marital coercive sexual actions from the crime of rape as the western laws did. Because of the literal meaning the Chinese character of JIAN originally had, without extra terms used, traditional Chinese laws had already achieved the same exemption of marital rape as its western counterparts did.

But, from the 1928 code of the Republic of China, the concept of rape, QIANG JIAN, was specially defined in explicit words in legislation. With the special redefinition, what QIANG JIAN precisely means as a legal concept no longer depends upon the traditional literal meaning of the Chinese character of JIAN but upon the whole legal proposition written in the codes.

So, with the special definition of rape and the general wording used, current Chinese criminal law has already achieved the same effect as the German code and the English acts. Under such a criminal legal system, coercive sexual actions of the husbands against their wives *are* the crimes of rape, legislatively.

2. The Marriage Law of the People's Republic of China

The legal marital relation stipulated in family law is the reason given by many people in China today to exclude a husband's act of coercive sex against his wife from the crime of rape; although they also agree that the act *per se*, from the perspective of

¹⁸⁵ *R v. R* [1991] 3 WLR 767.

¹⁸⁶ Criminal Justice and Public Order Act 1994, *Current Law Statutes*, Sweet & Maxwell, W Green, c 33, 33/142.

¹⁸⁷ <http://www.iuscomp.org/gla/statutes/StGB.htm>

criminal provisions, constitutes the crime of rape. The reason they give is the so-called doctrine of “duty of cohabitation.”¹⁸⁸ According to the doctrine, legal marriage means the special personal and property relation between a husband and wife. Cohabitation and sex life are the basic contents of the rights and duties between a husband and wife. The voluntary registration for marriage is the legal promise for cohabitation and sex life. If the promise is expressed once, it is enough to cover the whole period of the continued existence of the marriage. So whether the current Marriage Law has prescriptions expressing or implying such specialty of marriage to exempt a husband from raping his wife becomes the key factor of the legislative criminalization of marital rape in China.

The first marriage law of the People’s Republic of China was promulgated in 1950, providing:

*Article 7: Husbands and wives are companions of their common life, enjoying the equal status in the family.*¹⁸⁹

Some people have inferred the cohabitation duty from the “common life” phrase in this article.¹⁹⁰ However, this article was abolished in the 1980 marriage law. The current family law was promulgated in 2001 based on the revision of the 1980 family law, with no restoration of articles alike. Throughout the present statutes, no articles are found to imply the duty of cohabitation. There are neither any judicial interpretations nor commentaries proclaiming anything to the effect of marital consent to duty of sex in marriage. So, different from the *Article 1001* of the 1929-30 civil code in the Republic period, “actually the present Marriage Law in China does not prescribe the duty of cohabitation, which takes sexual life as its basic content of the duties.”¹⁹¹

The current marriage law does not either stipulate any terms like the *Article 1002* of the 1929-30 Republican civil code, giving different positions of rights to husband and wife in family domicile, property, etc., from which actual male superiority can be derived.

The present Chinese marriage law prescribes the following basic principles:

Art 2. (The Law) practices the system of freedom of marriage, monogamy and gender equality.

Art 4. Husband and wife should be loyal to each other and respect each other, ...

*Art 13. The husband and the wife are equal in status in the family.*¹⁹²

Obviously, the core of the principles is the equality between husband and wife. This essential gender equality principle was also prescribed in the 1929-30 civil code, but the difference is that current family law no longer has the contradicting articles on concrete matters that imply the actual male superiority as the 1929-30 civil code did.

¹⁸⁸ For example, Cheng Dongning, the vice president of Gaoyou Municipal People’s Court, Jiangsu Province, said: “Since the establishment of marital relation, the duties and obligations of both parties have therefore been clearly defined. Saying “no” one-sidedly to marital sexual life is not only inhuman and is also not in conformity with the conjugal relation established and protected by law”.

<http://www.peopledaily.co.jp/GB/shenghuo/76/123/20010405/433792.html>.

¹⁸⁹ <http://www.law999.net/law/doc/1/1950/04/13/00000321.html>

¹⁹⁰ Shi Meitang, “Husbands’ Raping Their Wives Are Not Criminal”, Law Science (FA XUE), vol.3, 2000.

¹⁹¹ Ruan Renhui: *Marital Rights, Marital Rape and New Marriage Law*,

<http://yuanrenhui.51.net/famarriage/concurright.htm>.

¹⁹² Su Dong, Feng Hui, Wan Qigang, *Introduction of New Marriage Law*, China Procuratorial Press, 2001, p114, p115, p116.

Under this gender equality principle, even the prescribed mutual loyalty and respect does not mean that either of the spouses has the legal right to force the other for sexual intercourse. If the husband/wife feels that the wife/husband does not fulfill her/his duty of cohabitation and sex, he/she may have the right to end the marriage, but still he/she does not have the right to force the wife/husband to have sex with him/her. This is determined by the most basic principle of husband-wife equality of present Chinese marriage law, by which the duty of cohabitation, if prescribed, would also be bound. Specifically, this means a married woman does not have the legal duty to consent to her husband's sexual requirement. Conclusively, there is no barrier in current marriage law to block the criminalization of marital rape.

From either the Criminal Law or the Marriage Law, we find no justification for the marital exemption for rape. Therefore, the husband's coercive act to have sex with his wife by violence, coercion or any other means is not excluded from the crime of rape as long as the current Chinese legislation is concerned.

2.2 Judicial practices in China of marital rape

Now it is clear that under the current Chinese legislation, marital rape is already a crime. In this part I will look into the judicial interpretation of these provisions to see how the legislation operates in practice. In 1980, by abolishing the 1950 prescription of "common life", which could imply the possible cohabitation duty, the 1980 family law has discarded with it the inconsistency with the rape law in the criminal code, and therefore made the criminalization of marital rape *legislatively* realized. Accordingly, my research also takes 1980 as the starting point.

2.2.1 Marital rape cases

A total of fifteen cases have been collected from 1980 until the present day. It should be noted that it cannot be guaranteed that these are definitely all the marital rape cases during this period primarily because China is not a case law country and there are not regular case reports like those in England or other Common Law countries. Though the Supreme Court regularly publishes the *Collection of Selected Cases*, however, this contains only a very small portion of the cases that were actually decided by the courts. As a result, other resources have been consulted which might provide references to marital rape cases in China: academic journals with articles concerning the topic, bulletins or periodicals from the Supreme and local courts, as well as ordinary media outlets like newspapers and magazines. Indeed it was found that the selections of cases by the Supreme Court were actually not as helpful as the other sources for collecting marital rape cases.

Luckily, since marital rape became a controversial topic all over China around the year 2000, most, if not all, marital rape cases are quoted or reported in academic articles and journals, court bulletins and even the daily newspapers and magazines. For example, Professor Li Dun, researcher from the Academy of Social Science of China, has collected 15 marital rape cases,¹⁹³ which is one of the sources of my case collection. However, some of his cases were before 1980 and I have not referred to them. And some other cases of Professor Li were only marital rape stories and these

¹⁹³ There are 15 cases in Li Dun's collection but I adopt only seven of them. Two of the unquoted were 1979 and 1976 cases and four of them had no years. But marital exemption was obvious in all the unquoted cases if settled in court.

conflicts were actually not settled in courts. These too have been ignored. Ultimately, seven out of Li's 15 cases form part of this collection.

I have also used other sources. *Cases and Judicial Interpretations of Criminal Law*, for example, is an academic journal focusing on the current problems and topical areas in the judicial practices of criminal law and criminal procedure. Since the year 2000, the journal has published series of papers on the specific topic of marital rape in several volumes, from which I have been able to collect some more recent cases.¹⁹⁴

With the other sources I have used, I can say that, although there is a chance that my collection may not actually include all the marital rape cases during the studied period, most of them should have been included. In any event, they should be sufficient in number to enable a statistically accurate representative analysis to follow.

The collection is shown below in the table of cases.

Table of cases

No. & title	Time of cases	Marital status at the time of cases	Special circumstances	Decisions	Reasons for decisions
1 Jia	1982	In the process of divorce proceeding	No	Charge dismissed	Marital exemption
2 Xia	1982	In the process of divorce proceeding	Cheating about the age at registration for marriage	Guilty of rape	Null marriage
3 Lao	1986	Married	Rape in public	Charge dismissed	Marital exemption
4 Wang	1986	In the process of divorce proceeding	No	Charge dismissed	Marriage exemption
5 Chen	1986	In the process of divorce proceeding	Rape was the direct cause of the death of the victim who committed suicide	Not guilty of rape	Marriage exemption
6 Zhao	1987	Engaged	No	Guilty of rape	No legitimate marriage
7 Jing Zhiping	1989	In the process of divorce proceeding	Kidnapped the victim directly from the court and illegally detained her for days and raped her.	Guilty of rape	No special reason given
8 Cao	1995	In the normal state of marriage	Leading to the death of the victim	Guilty of causing death by injury	Marital exemption
9 Bai Junfeng	1997	In the divorce proceeding	No	Acquitted	Marital exemption
10 Wang Weiming	1999	In the divorce proceeding	No	Guilty of rape	Uncertainty of marriage.
11 Li	1999	In the divorce proceeding	Cheating about the age at the marital registration	Guilty of rape	Null marriage
12 Wu Yaoxiong	2001	In the divorce proceeding	No	Acquitted	Marital exemption
13 Zhou	2001	In the divorce proceeding	Quit when persuaded by friends	Guilty of attempt to rape	Marital rape is criminal
14 Ping Zhihong	2001	In the divorce proceeding	Kidnapped and detained the victim	Guilty of rape	No special reason given
15 Li Guo	2003	In the divorce proceeding	No	Guilty of rape	Marital rape is criminal

¹⁹⁴ *Cases and Judicial Interpretations of Criminal Law*, vol.1, vol. 4, and vol.5.

2.2.2 Case Studies

Cases in the collection can be classified into three groups. The first group are the cases following the explicit principle of marital exemption of rape. Cases 1, 3, 4, 5, 8, 9, 12 belong to this group. In these cases, the allegation of rape took place while the marriage subsisted and the defendants were not convicted. The reasons given by the courts for the decision were always the marriage exemption of rape.

In cases 1, 3, 4, 5, 9, 12, the husbands and wives had already started their legal proceedings for divorce. However, since the divorce decree had not yet come into effect, the marriages, therefore, were still legally valid at the time of the husbands' alleged actions of coercive sex. The legally valid marriages were, according to the courts, what exempted the husbands from the crime of rape. The start of the divorce proceedings could not have made any differences to the marital exemption of rape.

Actually, it was not only that the divorce proceedings couldn't make differences to the marital exemption of rape. Even in cases where the husbands' coercive sexual action has caused serious results, the principle was still firmly adhered to.

In Case 3, the victim, Meng, had lost her affection for the defendant, Lao, after marriage. For a fairly long period of time, she just refused to have sex with him. Finally, Lao asked two of his colleagues for help. They worked together to tie up Meng and undressed her. Then Lao had sex with her right in front of the two colleagues. Yet the court acquitted the defendant.

In Case 5, the defendant, Chen, and the victim, Zou, had already reached the divorce agreement in the township judicial office but had not yet received the divorce certificate. Before the completion of the legal procedure for divorce, Chen forced Zou to have sex with him. And as a direct consequence of the coercive sex, Zou committed suicide thereafter. Also, the court found the defendant not guilty of rape. The decisions, due to the serious circumstances, were confirmed by the central procuratorial authority which has the judicial supervision power.¹⁹⁵

Similar serious results occurred in case 8. In this case, the marriage per se was not problematic in any degree yet. It was just a typical night, the wife was feeling ill when the defendant asked for sex. Because of her illness, so she refused. But the defendant, who was said to be a hot-tempered and rude man, flew into a rage because of the refusal. He had sex with his wife by force and kicked the victim in the belly, causing the rupture of her intestines and then her death. The defendant was convicted of causing death by injury but not of the crime of rape.

Case 12 was the latest in this group of cases but it was the first marital rape case in Sichuan, an inland province in Southwest China. It was also one of the cases that activated the heated discussions about the problem of marital rape in the whole nation. I would like to give an introduction to it in more detail. The wife Wang and the husband Wu had separated because they were about to divorce. But Wu still helped his wife with her farm work. On June 11th, 2000, Wu came to Wang's residence and pushed her into the bedroom, asking for sex, but Wang resisted and kept screaming. In fear of being heard, Wu pulled Wang into another bedroom, tore down her underwear and had sexual intercourse with her.

On June 14th, the Nanjiang County Procuratorate charged Wu with rape, and a prosecution was instituted. As there was not enough violence to constitute assault, the County Court held: The defendant was not guilty. Since the marital relation between Wang and Wu was still subsisting at the date of the alleged offence, the act of Wu did

¹⁹⁵Li Dun, "Relationship Between Individual Rights and Holistic Interests--- Analysis of Marital Rape in China from the Perspective of Sociology of Law", Cases and Judicial Interpretations of Criminal Law (XING SHI FA PAN JIE), vol.1 1999, p395.

not constitute the crime of rape and, therefore, the defendant was not guilty.¹⁹⁶ In so doing, the Court explicitly denied the possibility of rape in marriage. However, even the chief judge hearing the case personally agreed that, in fact, the defendant's action was in every degree fit for the definition of rape in the Criminal Law of the People's Republic of China.

"Wu Yaoxiong (the defendant) acted against the will of his wife, had sexual intercourse with her by violence. He certainly had committed the crime of rape. ... According to the Criminal Law, as long as the sexual intercourse is by violence and against the will of the woman, the crime of rape is committed", said Long Chifang, the chief judge of criminal division of Nanjiang County Court, Sichuan, also the chief judge of case 12, when giving the press his personal opinion after the case was settled.¹⁹⁷

However, the defendant was not convicted. The only reason the Court gave was that "the conjugal relation between the Defendant and the victim was still in the period of continued existence and therefore the Defendant's act did not constitute a crime and the charge by the Procuratorate was ill-founded".¹⁹⁸ It seems, then, that the Nanjiang Court followed the principle of "no rape in marriage".

The second group of cases are those following the actual principle of marital exemption of rape, examples of which are case 2, 6, 10, and 11. In these cases, the defendants were convicted, but the reasons given by the courts for the conviction were that the marriages were null or voidable. Therefore, despite the rape conviction, there was still no criminalization of *marital* rape. In Case 2 and 11, the marriages involved were nullified for the reason of the young ages at the time of registration of the marriages. The wife was only 17 years old in Case 2 and 19 in Case 11 when marriages were registered. The legal age for woman to get married is 20 according to the Chinese law, and the husbands in the two cases had false certificates of age for the registration of marriages. According to the family law about null marriages:

Article 10 The marriage is null in the following cases:

1. *bigamy*
2.
3. ...
4. *younger than the legal age.*

With the marriages nullified, the defendants were found guilty in Case 2 and 11. However, it was not that marital rape was criminalized. That the marriages were null was crucial. Similarly, in case 6, the defendant and the victim were only engaged but not yet married. So, as the court held, there was no legitimate marriage in the case to exempt the defendant from the liability of rape. In cases like these, the convictions did not mean that the principle of marital rape was adhered to; on the contrary, it was the principle that there can be no rape in marriage that was firmly adhered to.

These cases confirm again that the start of the legal process for divorce usually did not make difference in the courts' decision of marital exemption of rape. Actions, which would otherwise amount to rape, occurred in Cases 2, 10 and 11 and all took place during the divorce proceeding, but it was not the ground that court delivered the

¹⁹⁶ Verdict of the *Wu Yaoxiong* Case. <http://www.unn.com.cn/GB/channel2200/2201/200110/19/116461.html>.

¹⁹⁷ As this case was so special and disputable, Judge Long broke away from the customary rule and expressed his personal opinion after the case to the public so as to have the attention of the legislators and the law experts. <http://www.peopledaily.co.jp/GB/shenghuo/76/123/20010405/433792.html>.

¹⁹⁸ Verdict of the *Wu Yaoxiong* Case. <http://www.unn.com.cn/GB/channel2200/2201/200110/19/116461.html>

guilty verdicts in cases 2 and 11. But Case 10, the Shanghai case, is somewhat special. Since it is also the case that attracted most attention in the nationwide debate, I will examine it in more details.

The husband Wang Weiming started two divorce actions in June 1996 and March 1997. On October 8th, 1997, the Qingpu District Court, Shanghai, granted them the divorce decree. On October 13th, 1997, nine days before the divorce decree took effect, Wang came to the residence where the couple used to live. He found the wife, Qian, there. He wanted to have sex with her. Being refused, Wang had intercourse with Qian by force, causing several scratches on Qian's breast. Violence in this case was too slight to constitute assault.¹⁹⁹ On December 24th, 1999, the Court decided:

“Though the defendant and the victim were husband and wife, they had separated for more than 16 months and the Defendant had raised two divorce actions, they were already incompatible as husband and wife. Under the special circumstances that the divorce decree had been issued but not yet effective, the Defendant was against the will of victim by violence and therefore ought to be legally punished. However, whereas the case has its own peculiarities, the Defendant should be given a discretionary lighter punishment.”²⁰⁰

The defendant was convicted of rape and sentenced to 3 years of imprisonment with 3 years probation.

This case was the first marital rape case in Shanghai and it appeared to be quite special compared with other cases. It was special compared with the cases which also occurred during the remaining existence of marriage before divorce, like Case 12 in Sichuan: the defendant in the Sichuan case was acquitted while in the Shanghai case convicted. It was also special compared with the cases in which the defendants were convicted, like Case 2: in Case 2 the marriage was legally null while in the Shanghai case the marriage was yet still legally valid. This case, with its specialty, brought to a climax the heated discussion in China about marital rape.²⁰¹ Some commentators claim that, in this case, the court, on one hand, recognized that the conjugal relation between the defendant and the victim was in the period of continued existence, and, on the other hand, convicted the defendant. This would suggest that the Court has moved one step forward towards the recognition of marital rape as a crime and has already rejected the “no rape in marriage” principle.²⁰² Given that Shanghai, as the biggest coastal cosmopolitan area in China, always takes the lead in accepting new ideas, it would be understandable for many people to believe that the court there would again take the lead in criminalizing marital rape. However, on further consideration, this analysis cannot be accepted.

First, according to reasons given by the court for their decision, the defendant in case 10 was convicted not only for his actual act of raping but, more importantly, for his uncertain marital relation with the victim. The verdict gave the reasons for the conviction as the following:

1. “Though the defendant and the victim were husband and wife, they had separated for more than 16 months.”

¹⁹⁹ *Verdict of Wang Weiming Case*. Reference to Criminal Trial, vol. 2, 2000, p27.

²⁰⁰ *Verdict of Wang Weiming Case*. Reference to Criminal Trial, vol. 2, 2000, p27.

²⁰¹ Li Shunzhang, “*New Perspective on Marital Rape Problem*”, Cases and Judicial Interpretations of Criminal Law, vol. 5, p450-451.

²⁰² Zhou Qi, Hu Zhiguo, “*On Wang Weiming Rape Case*”, Case Studies, vol. 2, 2000, p20. Or the website: chinalawinfo.com/xin/disxwpl.asp?code=129&mark=1452 (2002/2/11).

2. “The defendant had raised two divorce actions; they were already incompatible as husband and wife.”
3. “The divorce decree had been issued but not yet effective.”
4. “The Defendant’s act was by force and against the will of the victim.”²⁰³

Apart from the last reason given about the actual act of raping, the first three reasons were all on the basis that, at the time of the act of the defendant, the defendant and the victim did not have a normal husband-wife relation. The discussion about the uncertainty of the marital relation took up a much larger portion of the verdict than that about the violent forcible act itself. It is, therefore, reasonable to conclude that the Court took the lack of normal marital relation as the key factor in making the defendant’s act criminal, an even more important reason than the actual act of raping.

The other reason might be a more convincing one. The case was quoted by *Reference to Criminal Trial*, a journal edited by No. 1 Criminal Trial Division of the Supreme People’s Court of the People’s Republic of China. In the comments by the Supreme Court on this case, they said:

“We think, husband and wife, once married, have promised to live together and therefore have the duty of cohabitation. *Though it is not seen in the clear or mandatory prescriptions of law, the duty is deeply rooted in the ethical ideas of people and therefore proclamation in the writing of law is not necessary.* As long as the marriage is normal and continuing in existence, it is enough to keep the act of marital rape from the establishment of a crime. This is also why generally the act of marital coercive sex cannot be taken as the crime of rape in the judicial practice. *Therefore, generally speaking, a husband cannot be the subject of the crime of rape of his wife.*”²⁰⁴

The exemption of marital rape is the principle to which the Shanghai Case adhered. This may take away the reasons to be optimistic about the case’s progress in criminalizing marital rape, but this is not yet the worst. Comprehensive researches into the above two groups of cases will reveal the reasons to be pessimistic.

The first reason for pessimism lies in the number of cases that refused to follow the legislation. The above two groups have eleven cases altogether, counting for 73% of all the cases I have collected. Such a high percentage shows a serious inconsistency between the legislation and the judicial practices, which is quite negative to an effective legal system.

Secondly, judicial interpretation is not consistent either. On comparing the status of marriage in the Sichuan and Shanghai cases, the case facts were identical:

1. The divorce procedures had started.
2. The courts had issued decree of divorce.
3. The decrees were not yet effective when the husband’s alleged action occurred.
4. The legal processes for divorce had not completed and therefore the marriages had not yet legally dissolved.

Given the same legal status of marriages, the Sichuan court decided that the marriage was still legally valid and therefore gave marital exemption to the defendant

²⁰³ *Verdict of Wang Weiming Case*. Reference to Criminal Trial, vol. 2, 2000, p27.

²⁰⁴ No. 1 Criminal Division, Supreme People’s Court: *Reference for Criminal Trial*, Vol 2, 2000, p 28.

while the Shanghai court decided that the marriage was already not sufficiently legally valid and therefore did not give the defendant the marital exemption.

From this perspective, the Shanghai case demonstrated more inconsistency rather than progress of law. The inconsistency lies not only between the legislation and judicial practices, but also between the courts themselves. This inconsistency means that while the legislation is one thing, the judicial practice could be quite another. And this is why marital rape is criminal in legislation but not in practice. This inconsistency also means that even upon the same legal facts, different conclusions and decisions could be arrived at in different courts. And this is why marriage, though of the same legal status, played quite different roles in Sichuan and Shanghai cases.

These inconsistencies may have prevented effective operation of the Chinese marital rape law, but, on the other hand, they can also be the reflections of the changes in current Chinese law, or the reflection of the dynamic nature of human laws that is caused by the constantly changing social environments in which they develop. Therefore, these inconsistencies of current marital rape law in China may well explain why, while most cases adhere to the principle of marital exemption, there are still a third group of cases in which the criminalization of marital rape was the principle followed, such as Case 7 in 1989, Case 13 in 2001, Case 14 in 2001, and Case 15 in 2003.

Defendants in all cases in the third group were found guilty but they are different from the Shanghai case in that the courts did not attempt to establish the lack of normal marital relation for the conviction of the defendants. Marriages in the third group of cases, normal or not, did not seem to play much role in the courts' guilty verdicts. The only factor to constitute the crime of rape, as given by the courts, was the actions *per se* of the husbands' coercive sex.²⁰⁵ Therefore, it is fairly obvious that the courts here strictly followed the legislative definition of rape in the criminal code.

Case 13 in 2001 may deserve special attention. In the case, the husband Zhou attempted to rape the victim before their divorce decree took effect. However, he voluntarily gave up with the persuasion of relatives and friends. Still, he was accused of rape the next day in the court and convicted of attempted rape. Given the evidently lighter circumstances compared with other cases, and given that the province of Shaanxi, in which the case occurred, is the inland rural province where traditional family ethics tend to dominate, Case 13 is of particular importance.

An additional factor of note is the different times in which the third group of cases occurred. Compared to the other two groups, the third group of cases mostly took place in the latest years. This might mean a possible trend for judicial practices to become consistent with the law. But, still, this optimistic view will need more cases to confirm, more cases that criminalize instead of exempt marital rape.

Conclusively, marital exemption of rape is still the basic principle followed in judicial practice in over 70% cases. However, in some of the more recent cases, contrary to the traditional view, the criminalization of marital rape was the principle followed. But it remains to be seen whether these recent cases actually form a new trend or just are some more inconsistencies in judicial practices.

²⁰⁵ See the verdict of *Ping Zhihong* Case for example. <http://zfr.scnu.edu.cn/court/jiaodian/hunneiqliangjian.htm>

2.3 Debates of law people

Law people are those who play a direct or significant role in either the making or the practice of law. They can be legislators, judges, lawyers, law professors or other law-related scholars. Given their direct role in law, the inconsistency of marital rape law is a reflection of the disagreement of law people about marital rape, with legislators criminalizing it and judges decriminalizing it. In turn, the inconsistency between legislators and judges caused further disagreements among law professors, lawyers, and even scholars of sociology and other law-related fields. Readers may already have some idea of how polarised the debate has been from the first chapter. "In the Chinese legal history, there has not been yet another topic that has attracted so much attention and aroused such nationwide discussion as marital rape has".²⁰⁶ Such a heated discussion seems inevitable because it is said that, "Recent discussions about marital rape are not only the effects of the feminism's introduction into China or of the wakening rights consciousness of Chinese people. Moreover, as a legal phenomenon, they have deep connections with China's society, history, culture as well as the humanist psychological structure of Chinese people."²⁰⁷

However, as April 2001 approached, when the new marriage law was about to come into force, people involved in the discussions started to expect the new law would give explicit and special provisions concerning the problem thus ending all the disagreements and debates.²⁰⁸ To their disappointment, the new law did not provide what people expected. The debate continues and the disagreement whether marital rape should be criminalized or not remains.²⁰⁹ The following is an introduction about the major arguments in the debate.

2.3.1 The opposing opinions

The opposing opinions of the criminalization of marital rape hold that during the subsistence of marital relation, husbands' actions of coercive sex against their wives are not the crimes of rape. Specific reasons given for the negation of marital rape are varied, which can be grouped into five kinds: conjugal rights, husband's exemption, insufficiency of the degree of danger, difficulty in proving and the literary meaning of QIANG JIAN.

literary

1. Conjugal rights

The conjugal rights doctrine holds that conjugal rights, as the important rights of marriage law, refer to all the reciprocal rights between husband and wife formed on the basis of the status of spouse, including conjugal personal rights and conjugal property rights.²¹⁰ Conjugal personal rights can accordingly include the rights to mutual support, the rights to require the spouse to cohabit, the rights to require the spouse's loyalty, etc. Conjugal rights in usual sense refer to the mutual obligation between husband and wife to cohabit and to be loyal.²¹¹ Cohabitation is a legal duty, which neither the husband nor the wife, without legitimate reasons, can refuse to

²⁰⁶ See: <http://chinalawinfo.com/fzdt/qiangli.asp> Quote from the organizer of a special online forum on marital rape hosted by The Law School in Peking University.

²⁰⁷ <http://lawnews.csdn.net.cn/news/zhuanti/jiatinbl.htm>.

²⁰⁸ Wang Yong, "Reflections on Marital Coercive Sex from the Perspective of Criminal Law", Cases and Judicial Interpretations of Criminal Law, vol. 5, p429.

²⁰⁹ Ibid.

²¹⁰ Shao Shixing, "Analysis of the Duties of Cohabitation and Loyalty between Husbands and Wives", Law Review, vol. 1, 2001, p110.

²¹¹ Ibid.

perform. Since sex is an important part of cohabitation, the husband therefore has the right to demand the wife to perform the duty and the wife cannot refuse the required intercourse based on the duty of cohabitation. Accordingly any sexual intercourse between husband and wife does not constitute the crime of rape.²¹²

The legal meaning of the conjugal rights doctrine is the affirmation of the cohabitating duty based on the marriage of free will. The legality and the relative stability of marriage decide that the consent to cohabit has its generality and permanency in validity. And the termination of cohabitation as a legal duty can be valid only through due process of law.²¹³ Before the establishment of marriage, individual men and women have the absolute freedom of sexual self-determination, which shall not be infringed by anybody. After marriage sexual self-determination of both men and women becomes a kind of relative freedom, which is limited by the consent to marriage. The absoluteness of sexual self-determination is extramarital only.²¹⁴

2. Husband's exemption

The doctrine of husband's exemption holds that the husband, with his special status, enjoys the rights to cohabit with his wife. Since the establishment of the marriage, the wife has given the life-long consent to have sex with her husband, and the husband does not have to ask for consent each time before intercourse. Otherwise, there will be the inconsistency between the crime of marital rape in criminal law and the duty of cohabitation and loyalty in marriage law.²¹⁵ On the basis of this doctrine, some law people argue that criminalizing marital rape is not only against the traditional legal culture but also against the current marriage law of China, which prescribes mutual loyalty.²¹⁶ Some people also argue that it would damage the stability of the social and family life if we criminalize marital rape because neither custom nor legislation in China has done so before.²¹⁷ Though such actions *are* against the will of women, they conclude, however, they are not illegal and should be regulated with moral rules.²¹⁸

The doctrine of the husbands' exemption shares substantial commonality with the conjugal rights doctrine, with only slight differences in the perspective of observation. The substantial commonality is that both the conjugal rights doctrine and the doctrine of husband exemption well conforms to the traditional Chinese moralities and ethics. Though the claim of the husband exemption about current marriage law's prescription on cohabitation duty is falsified in the debates by the supporters of the criminalization of marital rape,²¹⁹ their arguments based on the current cultural environment about the instability of social life seem to be irrefutable to the supporters of marital rape law.²²⁰

Traditional Chinese ethics take married women attached to their husbands and cohabitation is certainly the duty involved. Cohabitation and mutual loyalty between husband and wife are not only the reflection of physiological and ethical values of

²¹² Ibid.

²¹³ Zhang Xianyu, "On No Rape in Marriage", Law Science, vol. 3, 2000, p55.

²¹⁴ Ibid.

²¹⁵ Ye Qing, "Proposal for the Legislative Deficiency in the Crime of Rape in the New Criminal Code", Academic Journal of Politics and Law, vol. 4, 1998, p67.

²¹⁶ Chen Weimin, "Are Husbands Criminally Liable for Raping Their Wives Before Divorce Decrees Take Effect?", Politics and Law, vol. 2, 2000, p56.

²¹⁷ Ibid.

²¹⁸ Ibid.

²¹⁹ Li Kai, "Also on Marital Rape", People's Adjudication, vol. 12, 2000.

²²⁰ Fu Liqing, "Marital Rape Should Wait--Between To Be and Ought To Be", Cases and Judicial Interpretations of Criminal Law, vol. 4, p416. Or the website: chinalawinfo.com/xin/disxwpl.asp?code=129&mark=1504 (2002/2/11).

marital relation but also the requirement of the essence of marital and family relations. People holding the two doctrines emphasize guiding function of law as the criterion of value judgment for the whole society.²²¹ They think that at the present time China is in the middle of a transformation process where the old system of values has collapsed but a new system of values has not yet been established. In this transforming process, there are many unstable factors in the relationships of marriage and family.²²² Higher divorce rates, extramarital sex, etc., all come as a shock to the stability of marriage and family relations. Many people are not happy with such realities. Under such circumstances, the law ought to play the stabilizing role in the conflicts of values to support the duty of cohabitation and mutual loyalty between husband and wife. This is what the majority of Chinese people expect even today after a long time of preaching of women's independent status and rights.²²³

There are two key points in the arguments of the two doctrines to decriminalize marital rape. First are the most fundamental cultural arguments of traditional Chinese ethics and morality. It is from the basic premise that the opponents of marital rape draw their conclusions. Second is the judgment about present reality in Chinese society. The opponents of marital rape law believe that traditional Chinese ethics are still dominating the current Chinese society and therefore the corresponding law of the decriminalization of marital rape ought to be applied in such a society.

3. Insufficiency of social danger

The doctrine of the inadequacy of danger holds that husband's coercive sex against his wife is far less dangerous than raping other women because the so-called marital rape has its special exclusiveness.²²⁴ The danger of marital rape is not the actions *per se* but only its means of violence and coerce. And law decides the liability of an action in accordance with the danger of it. With the specialty of marital rape, its danger can hardly constitute the criminal liability of the actor. And it would be even unjust to prescribe the equal liability as the ordinary rape, which has much greater social danger.²²⁵

The major criticism this doctrine has received from the supporters of marital rape law is how to decide social danger. According to some critics, it is quite arguable to say that it is a lesser danger to society for a man to rape his own wife than to rape another woman.²²⁶ Also some people argue, the notion of social danger *per se* is not substantively meaningful to the criminal law.²²⁷ Actually, whether an action is socially dangerous or not is quite subjective, depending not only on the action itself but also on how people see it, which again would have a lot to do with cultural elements²²⁸

4. Difficulty in proof

People who argue the difficulty in proof suggest that sexual actions between husband and wife are personal privacies recognized by law. Even if coercive sex has happened, with wounds on the wife's body and sperms in the wife's urine, however, if

²²¹ Ji Xiangde, "Rational Analysis and Reflection on Marital Rape", Journal of Shandong Police, vol. 4, 2001, p32.

²²² Ibid.

²²³ Ibid.

²²⁴ Yang Deshou, "Legal Liability of Marital Coercive Sex", Journal of Chinese Criminal Law, vol. 5, 2001, p103.

²²⁵ Ibid.

²²⁶ Chen Xingliang, "The Criminal Legal Culture in the Law-Ruled Country", The People's Procuratorial, vol. 11, 1999, p14; Ji Xiangde, "Rational Analysis and Reflection on Marital Rape", Journal of Shandong Police, vol. 4, 2001, p32.

²²⁷ Ibid.

²²⁸ This will be discussed later in the thesis about the attached meaning. See p100.

the husband refuses to admit, it is still hard to prove either the sequence in which the violent actions and sexual intercourse have taken place, or that the purpose of the violence was to have sex. Since it is so difficult to prove non-consensual intercourse, even with traces of violence and injuries, then it would be even harder to prove when threats or other means is taken for the coercive sex. Therefore, even if marital rape is criminalized, such are the difficulties of proof, the law will still be practically unworkable.²²⁹

This argument is found by its critics to be even weaker than the previous ones. Difficulties in proof are not limited to sexual offences. Therefore it cannot be the reason not to criminalize marital rape.²³⁰

The linguistic argument about the literal meaning of JIAN is that the core word in the Chinese term for rape, QIANG JIAN, refers only to the extramarital sex. And the concept of marital rape therefore cannot exist in the Chinese context.²³¹ In my introduction to the Chinese legislative background in the first part of this Chapter, I have already shown why this argument cannot be established.

2.3.2 The supporting opinions

The supporting opinions of the criminalization of marital rape think that husbands' coercive sex with their wives constitutes the crime of rape. And the main reason given is that the subjects of the crime of rape are general subjects and the criminal law of China does not prescribe the husbands' exemption. There are two specific doctrines in defining the actions of marital rape.

1. Time of the action

One doctrine holds that if the action takes place during the period of time when the husband and wife are in the legal process for divorce or when they are in the long-term separation, it will constitute the crime of rape. The doctrine thinks that sexual self-determination is the basic right of every adult. Though marriage does mean mutual duty of cohabitation, it does not mean the irrevocable consent to sex. Therefore husbands do not have the right to force their wives to have sex. Especially when they are divorcing or have separated for a certain length of time, they are no longer normal husband and wife and the marriage is no longer in the legally normal state, the duty to submit to intercourse disappears. So, if husbands have coercive sex with their wives at the time of these special circumstances, they will commit the crime of rape.²³²

There are three key points that require special attention in this regard. The first is that the doctrine is *for* the criminalization of marital rape, which is contrary to all the arguments of the opposing opinions. Secondly, the most fundamental basis for this doctrine to support the concept of marital rape is the belief that "sexual self-determination is the basic right of every adult", including women. This is the opposite notion about women's status from that of traditional Chinese ethics, the totally different cultural elements from which a different legal conclusion is drawn about marital rape. Thirdly, this doctrine is not a thorough one in criminalizing marital rape.

²²⁹ Yang Deshou, "Legal Liability of Marital Coercive Sex", Journal of Chinese Criminal Law, vol. 5, 2001, p103.

²³⁰ Ibid.

²³¹ Zhang Xianyu, "On No Rape in Marriage", Law Science, vol. 3, 2000, p55; Liu Xianquan, "It's Improper to Criminalize Marital Rape", Law Science (FA XUE), vol. 3, 2000, p58-59.

²³² Chen Weimin, "Are Husbands Criminally Liable for Raping Their Wives Before Divorce Decrees Take Effect?", Politics and Law, vol. 2, 2000, p56.

By claiming marital rape is criminal only when the state of marriage is no longer normal, it offers only its partial support to the concept of marital rape. Why it does so is because the doctrine recognizes the restriction upon the sexual self-determinant of women by the duty of marital cohabitation.

The belief of the doctrine that "sexual self-determination is the basic right of every adult including woman" does not have any explicit legal prescription, but it can be derived from the fundamental principle of modern law about women's equal status to men, which, in turn, comes ultimately from non-legal values of women's rights. The restriction upon sexual self-determination by cohabitation duty is on the other hand the result of the traditional family ethics in China. Therefore, the partiality of this doctrine is in a degree the result from the conflicts of two opposite cultural elements, the notion of women's independent right of sexual self-determination v. the traditional ethical duties caused to women by marriage.

2. Circumstances of actions

The other doctrine supporting the criminalization of marital rape advocates that whether the crime of marital rape is committed or not should be decided by the specific circumstances of the action. If the husband uses light violence in the coercive sex with his wife, and the circumstances are rather light, the action can be identified as not criminal. For example, if the wife says no because she is in the period or not in the right mood and the husband's action of coercive sex meet only language refusal or other light resistance, he does not commit the crime of rape. However, if the husband uses serious violence or has other serious circumstances, for example, causing bodily harm to his wife, or raping his wife in the presence of another person(s), the action should constitute the crime of rape.²³³

This is also a partial supporting doctrine for the criminalization of marital rape. Why husbands' actions of coercive sex with light circumstances can be excluded from marital rape is because, according to this doctrine, though they also infringe wives' rights, these actions are not socially dangerous enough and it would endanger the stability of marriage if these light actions are also criminalized. Morality can be a better regulation than the criminal law for these actions. On the other hand, serious actions, with their greater danger, are sufficient to pierce the shield of marriage so as to be criminalized just as the ordinary crime of rape.²³⁴

Just as the time doctrine, we see a compromise between two opposing cultural factors in the partiality of the circumstance doctrine. It is its belief of the wives' independent rights that makes the doctrine think that marital rape ought to be criminalized. However, the remaining notion of the morality-based regulation for conflicts within marriage prevents the doctrine from supporting the thorough criminalization of marital rape.

In the debate about marital rape, it is difficult to find people so radical as to preach the complete and thorough criminalization of marital rape in practice. The above two partially-supporting doctrines are those that have gone the furthest. Even those who consider marital rape ought to be criminalized completely in theory turn out to preach partial criminalization in legal reality. This has much to do with the supporter's judgment about the realistic conditions of cultural elements in current Chinese society. Though the supporters of the criminalization of marital rape recognize the criminalization is the necessary result of women as independent and equal persons before law, however, they mostly are not confident with the social

²³³ He Yifu, "Marital Rights and Marital Rape", *The Application of Law*, vol. 4, 2001, P54.

²³⁴ Ibid.

reality, where the incompatible traditional ethics are still dominating. As a result, these cultural elements force them to compromise. In a word, cultural elements always play an important role in the debates of law people about marital rape law.

2.3.3 Summary

For both the opponents and the supporters of the criminalization of marital rape, cultural elements are always the most important and fundamental arguments. They both draw their conclusions, whether *for* or *against* the concept of marital rape, from their own cultural premise.

Judgments about the current status of different cultural elements in the social reality play another important role in law people's view about whether marital rape should be criminalized or not in the current Chinese law. The usual judgment about the social reality is that current Chinese society is still dominated by the traditional ethics, which is in essence against the concept of marital rape.

Such a judgment of reality well supports the opponents of the criminalization of marital rape. But, for those who have already accepted women's rights values, like the legislators, such a judgment of reality means a dilemma. According to their accepted women's rights notions, marital rape ought to be criminalized. But according to the realistic cultural environment, marital rape cannot be criminalized. This is what contributes to the unthoroughness of the current supporters of the criminalization of marital rape in China.

The sad feelings of dilemma of the supporters can be well represented by Dr. Fu Liqing from Peking University. In his article "*Marital rape should wait: between to be and ought to be*", Dr. Fu concludes: "If we look back again at the discussions about the problem of marital rape after all the zigzags and roundabouts, we could probably cool ourselves down to think deeper. I would say, under the current social background, decriminalizing marital rape, though not a good choice, is a rational choice".²³⁵

Up to now, we could see that the crux about whether or not marital rape should be criminalized in current China lies more in judgments about the realistic cultural environment rather than cultural elements *per se*. What is true map of distribution of the powers of different cultural elements? That is what I will discuss next.

2.4 Attitudes of lay people

Before the further introduction to the relevant cultural elements concerning the Chinese marital rape law, we might need to make clear first what are these cultural factors. They are, in fact, the current ideas of people about family ethics, especially about the husband-wife relationship, the status of wife in the family and, particularly, the problems concerning women's rights of sexual self-determination. That is to say, the decisive cultural factors for marital rape law, which law people care so much, are just the attitudes of the common lay people toward marital coercive sex.

²³⁵ Fu Liqing, "*Marital Rape Should Wait---Between To Be and Ought To Be*", Cases and Judicial Interpretations of Criminal Law, vol. 4, p416. Or the website: chinalawinfo.com/xin/disxwpl.asp?code=129&mark=1504 (2002/2/11).

2.4.1 Surveys in Beijing, Shanghai and Guangzhou

The opponents of the criminalization of marital rape believe the traditional Confucian ethics are still dominating in Chinese society. And many supporters of the criminalization of marital rape also agree with it. But neither of them have provide sufficient empirical evidences to support their claims. As the cultural elements are just the attitudes of the lay people towards marital coercive sex, they are actually not very difficult to find out by means of surveys.

During my research, I found some surveys done by a private research company about the attitudes of common people in China today towards marital rape. Perhaps interested in the nation-wide discussion, a commercial research institute Horizon-China Research, a leading research firm in the research industry of China, conducted a survey about marital rape in 2000 in the three biggest cities of China: Beijing, Shanghai and Guangzhou. The surveys adopted the method of multi-step random sampling and interviewed 939 young city women, aged 18-35, in Beijing, Shanghai and Guangzhou, with the data weighted according to the population in each city, which could therefore basically show the views of the young women in the cities.²³⁶

According to the surveys, nearly 70% of the interviewees recognize the existence of marital rape as a problem of life, while 14% denies its existence and 16% do not know.²³⁷

It exists.	70.7%
It does not exist.	13.5%
I do not know.	15.8%
Total	100

For the attitudes towards legal solutions of marital rape problem, about 70% of the interviewees agree with it, with 38% strongly agree. Those who reject legal solutions count for 10% and the rest 20% find it hard to decide.²³⁸

Strongly disagree	2.20%
Not quite agree	8.30%
Neutral position	13.90%
Fairly agree	32.10%
Strongly agree	37.50%
I do not know.	6%
Total	100.00%

When asked whether they have heard about the new marriage law, which would be passed in April 2001 and expected to make special prescriptions about marital rape, 64% of interviewees said yes while 36% said no.²³⁹

²³⁶ Horizon, *First Hand* (49), 6 Nov. 2000.

²³⁷ Ibid.

²³⁸ Ibid.

²³⁹ Ibid.

Yes	64%
No	36%
Total	100%

Comparatively, Shanghai always takes the lead among the three cities on every aspect of acceptance of the criminalization of marital rape. Shanghai has the highest rate of 77.5% recognizing the existence of marital rape, with 65.3% in Beijing and 66.4% in Guangzhou.²⁴⁰ When asked whether you would agree with legal solutions to the problem of marital rape, interviewees in Shanghai again have a far higher percentage (77.2%) than that in Beijing (65.3%) and Guangzhou (66.4%) .²⁴¹

Comprehensive analyses show that attitudes towards legal solutions of marital rape problems have close connections with factors like marital status, age, education, occupation and family income. Generally, interviewees with younger ages, higher education and income are more likely to recognize the existence of marital rape as a problem of life and support legal options for the solution of the problem. In contrast, married people were more conservative, a much lower percentage of whom recognize marital rape than the unmarried.

	Married	Unmarried
Strongly disagree	2.1%	2.3%
Not quite agree	5.1%	11.5%
Neutral position	12.8%	14.9%
Fairly agree	29.5%	34.7%
Strongly agree	45.5%	29.6%
I do not know	4.9%	7%
	100%	100%

	Junior High school and below	Senior high, Technical secondary and Professional schools	Community college	Univ. & above
Strongly disagree	2.2%	2.2%	2.5%	2.0%
Not quite	11.2%	8.8%	7.5%	5.4%

²⁴⁰ Ibid.

²⁴¹ Ibid.

agree				
Neutral position	20.1%	14.0%	11.5%	10.8%
Fairly agree	29.9%	32.2%	34.5%	30.4%
Strongly agree	26.9%	36.2%	39.5%	48.6%
I do not know	9.7%	6.6%	4.5%	2.7%
	100%	100%	100%	100%

Table 6 Knowledge about new marriage law of people in different ages

	18-19	20-24	25-29	30-34	35
Yes	55.60%	61.90%	67.90%	68.10%	67.60%
No	44.40%	38.10%	32.10%	31.90%	32.40%
	100%	100%	100%	100%	100%

Finally the survey report concluded that 70% of the interviewees recognize the existence of marital rape as a social problem and agree to solve it with legal approach. What this shows, according to the survey report, is the growing awareness of the female in current China of their rights: women are, first of all, human, who have duties as wives, but, more importantly, their dignity as persons.²⁴²

The results of the survey show an obvious agreement in the cities, which is the same dominating favorable idea shared by the majority of the people about marital rape law. Being typical and dominating, being shared by most members in the communities, the agreement well fits the concept of culture as defined in the previous chapter. So there exists something that can be called culture in terms of the problem of marital rape law, at least in the three cities where the surveys were conducted.

With 70% people accepting the idea of the concept of marital rape, it is enough to label the three big cities as appropriate cultural environments for the criminalization of marital rape. The wide recognition of marital rape here shows us a favorable social circumstance in which modern marital rape law should operate effectively. Unfortunately this picture provided by the surveys does not conform to the actual operation of marital rape law in China. The law's legislative/judicial inconsistency as well as the inconsistency within judicial practices provides us reasonable doubt on whether or not the surveys based on the three biggest cities have depicted a true and complete picture of the whole Chinese society.

It is a matter of commonsense that the rural areas and the biggest cities like Beijing, Guangzhou and Shanghai have remarkable differences between them, economically and culturally.²⁴³ Big cities like Beijing, Shanghai and Guangzhou are

²⁴² Ibid.

²⁴³ Huang Ping, In Search for Survival: A Sociological Study of Rural-Urban Migration, Yunnan People's Press, p71.

known for their modern ideas and liberal attitudes towards marriage and sex life while the rural areas are usually thought to be much more conservative and adhere to traditional ethics in terms of problems like marital rape. If the above assumption is true, the surveys in these three cities alone are not sufficient to conclude about the cultural conditions in the whole nation of China. If the assumption is not true, we will need empirical evidences to falsify it so as to verify the surveys' validity for the whole nation. This means, we need separate surveys conducted in the rural areas to prove that they are not so different from the cities. Either way, we cannot just take for granted the validity of the survey in only the three biggest cities in the Chinese society as a whole. Only when we have empirical evidences to clear away the reasonable doubts about the urban/rural differences, can we use the surveys in Beijing, Guangzhou and Shanghai as valid data for the rest areas of China as well.

Also, the inland rural areas are where most Chinese people live. Of the 1.3 billion people in China 62% live in rural area and are engaged in farming. Only 10% of people live in the well-developed coastal cities in the east.²⁴⁴ The number of people living in the developed cities like Beijing, Guangzhou and Shanghai would be even smaller. Given the assumed big difference between the rural and urban population in China, any study of the ethical ideas in Chinese society cannot let the urban be the representatives of the rural. On the contrary, the rural are the least to be ignored.

Unfortunately the above survey in the three biggest cities in China is the only empirical material available for us to see what the common ideas about marital coercive sex are like in the current Chinese society, which is therefore far from sufficient. In order to have a more reflective picture about the cultural environment of marital rape law in current Chinese society, more information is required, especially about the inland and rural areas. That's why I have to conduct my own survey for the information needed.

2.4.2 Surveys in Qingdao city and the rural areas

1. Deciding the observatory objects

Naturally my own survey is to find out the cultural conditions in small and medium-sized cities and, especially, the inland rural areas, aiming to verify or falsify the assumed urban/rural differences in cultural elements concerning marital rape. It is under this goal that I have chosen as my objects of observation, which are the city of Qingdao, a county town of Shenxian and a village of Pengzhuang in Shandong Province and two villages of Yongxing and Dachang in Shanxi Province.

What I am most interested in is the inland rural area, which is the largest in size and where the largest proportion of Chinese population lives. If we talk of China as one society, the society would have lost its main body without the rural people. If we talk of China as a culture, the culture would not exist if the rural people were excluded. If we talk of Chinese law as a real *Chinese* law legitimated by its own people, it is essential to recognize the law as applied in rural areas. However, with the vast land, strong tradition, undeveloped economy and less communication with the outside, the inland rural area is usually considered as a model of the most conservative communities in terms of marital rape law.

I have had two observatory objects of this type. One is the inland county town, Shenxian, together with an inland village, Pengzhuang, of the Province of Shandong. Pengzhuang village is under the administration of Shenxian County and very close (4 km) to the town, with the same dialect spoken. Though the Province is coastal, the

²⁴⁴ See the Bulletin of the Fifth National Census (2000), <http://www.stats.gov.cn/tjgb/rkpcgb/>.



county town and the village are far from the sea and, as I have known from my childhood, the coastal part is like another province, the dialects of which cannot be understood in village of Pengzhuang and the County town of Shenxian. Therefore, the two villages make good representatives of the largest inland rural community in China.

I have surveyed another two villages, Yongxing and Dachang, in the further northwest province of Shanxi. The province is truly inland, with no access to the sea, and the economy there is underdeveloped as most inland areas of China. They live a traditional and tranquil life, making a perfect model of traditional Chinese communities in the vast rural areas.

Qingdao, as a medium-sized city on the eastern coast of China, is chosen by me as the model of the right-in-the-middle between the most liberal and the most conservative ones. Considering that it is a quite smaller and quieter city than Beijing, Shanghai and Guangzhou and backed with a vast rural neighbourhood of strong traditional ethics, Qingdao is expected to be sort of retreat from positions of the above three biggest cities. But it is a coastal city after all, which might show some differences from the inland rural communities as well.

So, these are the places I chose to observe as the representatives of communities different from those of big coastal cities like Beijing, Shanghai and Guangzhou. Choosing them, I expect to find out the other side of cultural environment for current Chinese marital rape law, which is expected to be different from or even opposite to the ideas about marital rape from those in Beijing, Shanghai, and Guangzhou. Given the much larger size of rural areas in China, these cultural elements, if found different, ought also to be more important than those in Beijing, Shanghai and Guangzhou for the studies of cultural influences on marital rape law.

My survey aims at a comparatively larger range of age and gender. Different from the Horizon-China survey, which observes only the young women between 18 and 35, I take as my objects of study all those who are above the age of 18, female and male. But the people above the age of 25 have turned out to be the main body of the interviewees in my surveys. This is good for the validity of my survey results for the following reasons: first people at the age of 25 or older have already had their own stable and mature ideas about things and therefore they are those who have more stable and reliable opinions about marital rape. Secondly people above 25 are mostly married and they therefore are the group of people to whom the problem of marital rape are most likely to occur, so, attitudes of these people are accordingly the cultural elements that are mostly likely to have factual effects on the operation of marital rape law. Meanwhile the 25 and above group are usually the main body of human society, which enjoys dominating status in any society. If culture is defined as "the complex of beliefs, attitudes, cognitive ideas, values and mode of reasoning and perception, which are typical of a particular society or social group", those of the 25-year-old people and the older ought to be what the concept of culture actually refers to.

The empirical studies of the thesis are based on 800 questionnaires obtained from the surveys, with 200 from the city of Qingdao and 600 from rural areas. Among the 600 rural questionnaires, I have had 300 from the two villages in Shanxi and another 300 from the village and the county town in Shandong. I expect the survey of these 600 people could represent the rural people's attitudes toward marital coercive sex. According to the latest census in 2001, the total Chinese population is 1.276 billion with 795.63 million in the rural area, amounting to 62.3% of the total.²⁴⁵ 600 is an

²⁴⁵ <http://www.stats.gov.cn/tjgb/rkpcgb/>.

incredibly low number compared with 795.63 million. Whether the survey results be valid or not is decided by the following factors:

First the traditional Chinese family ethics has been well established all over China for thousands of years. Given no external activator causing new changes, the attitudes of rural people towards marital coercive sex, which result from the traditional family ethics, would be the same in all the villages and county towns.

Secondly, the major reason for the changes of Chinese people's attitudes towards marital coercive sex is the western influences.²⁴⁶ It is agreed as the macro social truth that, though also facing the challenges of western influences, rural areas all over China are at about the same position before the western intrusion into the Chinese family ethics, which is rather conservative and close compared with the coastal cities.²⁴⁷

Accordingly, though the total number is large, I do not expect much difference among the rural people. Thus we can have an indicator of the validity of the survey results. Among the 600 rural questionnaires from two different provinces, if sufficient differences exist between them, the survey results are not valid. If no sufficient differences found between them, the surveys results ought to establish their reliability as the representative of the rural attitudes towards marital coercive sex.

The validity can be further confirmed with the second indicator. I have had another 200 questionnaires from Qingdao, hoping to establish with them the sort of in-between model of the two extreme ends: the inland rural areas and the coastal cosmopolitans. So, if evident agreement is found among the rural results while at the mean time evident difference found between Qingdao and the rural area, the validity of the surveys can be better established.

2 Design of the questionnaire

The following principles were followed in designing the questionnaire.²⁴⁸

1. The ultimate purpose of the questionnaire is to find out what the interviewees think about marital coercive sex, and the core question is whether they are happy with law treating it the same as the ordinary crime of rape.
2. Several concrete questions may have been asked while they are actually serving the same core question from different aspects. Such a design may help with better precision about the information obtained. Question 3 and 4, for example, are concerned with the same question of whether people are willing to use law as alternative for the solution of the marital coercive sex problems in life.
3. The questionnaire as a whole demonstrates a gradual transition from plain lay questions at the beginning to the more law-related questions at the end. Such a design is for the better understanding of the people lacking special legal knowledge.
4. Assuming that the interviewees lack special legal knowledge, the easy and common language was used so that it was easier for the interviewees to read. Even so, explanations of the questions in the questionnaire were applied whenever the interviewees had problems of understanding.
5. Marital status has two choices, married and unmarried. "Unmarried" means of course no experience of marriage while "married" originally in Chinese is JIE

²⁴⁶ Fu Liqing, "Marital Rape Should Wait---Between To Be and Ought To Be", Cases and Judicial Interpretations of Criminal Law, vol. 4, p416. Or the website: chinalawinfo.com/xin/disxwpl.asp?code=129&mark=1504 (2002/2/11).

²⁴⁷ Suli, *The Rule of Law and its Local Resources*, China Politics and Law Press, 1996, p23.

²⁴⁸ A sample of the questionnaire can be found in the Appendix.

GUO HUN, which means literally “has/had the experience of marriage” and therefore includes the divorced and the widowed.

2.4.3 The results of the surveys in Qingdao city and the rural areas

The results of the surveys in the inland and the rural areas do reveal much more information about current Chinese social realities in terms of people’s attitudes towards marital coercive sex. While some results conformed to my pre-survey expectations, others did not. However, as a whole, the surveys do show us a picture quite different from that by the survey in Beijing, Shanghai and Guangzhou.

The following are the results according to the different core questions concerned.

1. Marital coercive sex as social fact

Results from the investigated places give very affirmative answers to the actual occurrence of marital coercive sex in life. Questions 1 and 2 in the questionnaire are related to the actual existence of marital coercive sex as social facts.

Let’s start with Question 2, which is about whether marital coercive sex exists or not as a matter of fact. The results are as the following:

Table 7 Question 2 in Yongxing and Dachang

Does marital coercive sex exist?	
	Count & Percent
It does not exist at all	26 8.5%
It is very common	48 15.9%
It occasionally happens	200 66.7%
I do not know	27 9.0%

Table 8 Question 2 in Pengzhuang and Shenxian

Does marital coercive sex exist?	
	Count & Percent
It does not exist at all	21 7.1%
It is very common	55 18.4%
It occasionally happens	184 61.3%
I do not know	40 13.2%

Table 9 Question 2 in Qingdao

Does marital coercive sex exist?	
	Count & Percent
It does not exist at all	13 6.5%
It is very common	20 10.2%
It occasionally happens	148 74.1%
I do not know	19 9.3%

In the two villages of Yongxing and Dachang in Shanxi, 82.6% of the interviewees recognize the happening of marital coercive sex, with 15.9% thinking it very common and 66.7% thinking it happens occasionally. And the people in the rural area in Shandong and Qingdao city also enjoy a high percentage, which is 79.7% and 84.3% respectively. In contrast, people who deny the existence of marital coercive sex are relatively few, with only 8.5% in Yongxing and Dachang, 7.1% in Shenxian and Pengzhuang, and 6.5% in Qingdao city.

Therefore, the occurrence of marital coercive sex in life is recognized as a social fact by the majority of the people interviewed. And in order to reduce the risk that the recognition might be the arbitrary subjective judgment, we can get further confirmation for it from the data from Question 1.

Question 1 is about whether or not sex is a necessary duty of marriage that wives cannot refuse. Results are shown as the following tables:

Table 10 Question 1 in Yongxing and Dachang

		Is sex the necessary marital duty?	
		Sex is the necessary result of marriage	Sex is not the necessary duty, refusable
male	Count & % within gender	69 41.1%	99 58.9%
female	Count & % within gender	44 33.3%	88 66.7%
Total	Count & % within gender	113 37.8%	187 62.2%

62.2% of the interviewees think sex is not the necessary duty of marriage while only 37.8% think it is. The high percentage of the people who think the wives can refuse the husbands' sexual demand is beyond my anticipation. Let's observe the attitudes within each gender respectively. We find that 66.7% of women and 58.9% of men give the negative answer to Question 1 while 33.3% of women and 41.1% of men give the affirmative. When a man and a woman sharing the same answer to this question marry to each other, marital coercive sex is less likely to happen. Neither is the case in which the woman thinks sex is the duty while the man thinks not.

However, we find that while more than half of women, 66.7%, think they can refuse husbands' sex demand, nearly half of men, 41.1%, think the contrary. When a man and a woman from these two groups get married, there will be a high risk of marital coercive sex. Given that neither of the percentages with disputing ideas about sex as duty of marriage is low in each gender, the risk of the occurrence of marital coercive sex is high according to the results of Question 1.

Results in Shenxian and Pengzhuang, as shown in the following table, give an even more conservative picture, where 48.5% of men firmly believe in their rights on demanding sex from their wives which cannot be refused. Though a higher percentage of women agree with this, there are still 45.8% who disagree, causing an even higher risk of marital coercive sex than that shown in Yongxing and Dachang.

Table 11 Question 1 in Pengzhuang village and Shenxian

		Is sex the necessary marital duty?	
		Sex is the necessary result of marriage	Sex is not the necessary duty, refusable
male	Count & % within gender	59 48.5%	62 51.5%

female	Count & % within gender	97 54.2%	82 45.8%
Total	Count & % within gender	156 51.9%	144 48.1%

In Qingdao city, however, the risk seems to be lower. Only 26.8% of men still think their wives should not refuse their sex demands while as high as 73.2% tend to be more mild and agreeable husbands. This more liberal attitude compared with rural areas conforms to my expectation on Qingdao as a in-between model. However, when the 26.8% disagreeable men meet with the 57.7% of women, who are ready to refuse their husbands' sex demand, the risk of marital coercive sex, though lower, still exists.

Table 12 Question 1 in Qingdao

		Is sex the necessary marital duty?	
		Sex is the necessary result of marriage	Sex is not the necessary duty, refusable
Male	Count & % within gender	28 26.8%	75 73.2%
Female	Count & % within gender	41 42.3%	56 57.7%
Total	Count & % within gender	69 34.3%	131 65.7%

So, the data suggest an affirmative answer to the existence of marital coercive sex as a fact of life.

2. Marital coercive sex as legal fact

While most people recognize the factual existence of marital coercive sex as a problem of life, do they also regard it as a problem of law? How likely are the rural people today in China to take law as an option to solve the problem when it occurs? Questions 3 and 4 in the questionnaire are related to the core question.

As is well-known, traditional Chinese family ethics regards sexual affairs as taboo. People are always quite reluctant to admit any external interference to this private problem between husband and wife. For this reason, I had expected to see in the survey the traditional reluctance, especially in the rural areas, to take law as an alternative for the solution of the marital coercive sex problem. But I was wrong, and the results are far beyond my expectation.

Question 3 asks the interviewees to choose from the common options the most likely one they would use if the problem of marital coercive sex occurs to them. The results are as follows:

Table 13 Question 3 in Yongxing and Dachang

Options to solve the problem of marital coercive sex		Count & Percent
It's always personal privacy between husband and wife only, which needs no external interference		152 50.8%
Settle within family before senior members but not in court		27 9.0%
Go to the court if necessary		120 40.2%

Table 14 Question 3 Shenxian and Pengzhuang

Options to solve the problem of marital coercive sex		Count & Percent
It's always personal privacy between husband and wife only, which needs no external interference		148 49.4%
Settle within family before senior members but not in court		39 12.9%
Go to the court if necessary		113 37.6%

Table 15 Question 3 in Qingdao

Options to solve the problem of marital coercive sex		Count & Percent
It's always personal privacy between husband and wife only, which needs no external interference		59 29.6%
Settle within family before senior members but not in court		17 8.3%
Go to the court if necessary		124 62.0%

In Yongxing and Dachang, about 60% of people would like to solve the marital coercive sex problem within family while about 40% say they will go to the court if necessary, which is a fairly high percentage in the supposedly conservative Chinese countryside.

In Shenxian and Pengzhuang, which appears again more conservative than Yongxing and Dachang, there are nearly 38% of interviewees taking law as a possible solution. And with 2.3% of the interviewees in Shenxian and Pengzhuang who did not give a clear answer, the interviewees who explicitly prefer family solution are about the same percentage as those in Yongxing and Dachang.

Qingdao city again demonstrates its difference from the inland rural areas, with the high percentage of 62% of the interviewees taking law as possible solution and 38% otherwise. Qingdao, approximately, reverses the percentages in rural areas of the people saying "yes" and those saying "no" to legal solution of marital coercive sex.

However, women as victims of marital coercive sex play the key role in the realistic application of legal solution. Therefore more accurate information about Question 3 needs us to look the answers given by different genders separately.

Table 16 Question 3 by gender in Yongxing and Dachang

		It's always personal privacy between husband and wife only, which needs no external interference	Settle within family before senior members but not in court	Go to the court if necessary
Male	Count & % within gender	91 54.2%	10 5.6%	66 40.2%
Female	Count & % within gender	62 46.9%	17 13.6%	53 39.5%
Total	Count & % within gender	153 51.1%	27 9.0%	119 39.9%

Table 17 Question 3 by gender in Shenxian and Pengzhuang

		It's always personal privacy between	Settle within family	Go to the court
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		husband and wife only, which needs no external interference	before senior members but not in court	if necessary
Male	Count & % within gender	62 51.5%	7 6.1%	51 42.4%
Female	Count & % within gender	82 46.0%	32 18.0%	64 36.0%
Total	Count & % within gender	145 48.2%	40 13.3%	116 38.6%

Table 18 Question 3 by gender in Qingdao

		It's always personal privacy between husband and wife only, which needs no external interference	Settle within family before senior members but not in court	Go to the court if necessary
Male	Count & % within gender	34 33.9%	9 8.9%	58 57.1%
Female	Count & % within gender	25 25.0%	8 7.7%	67 67.3%
Total	Count & % within gender	59 29.6%	17 8.3%	125 62.0%

Results show that separate percentages by gender do have differences from total percentages in terms of those who say “yes” to legal solution of marital coercive sex. They remain approximately the same in rural inland: in rural Shanxi, 39.5% of women, which is close to the average percentage of 40% of the total; in rural Shandong, 36% of women, which is about 2% less than the average percentage of 38% of the total. In Qingdao, however, women are more active than men, where 67.3% of women would take legal actions for marital coercive sex, which is over 5% percent higher than the average percentage of both genders. This shows that in rural area, though the risk of marital coercive sex is higher, women, as victims, are less likely to choose legal remedy for the problem.

Other than the above information, we can get more from Question 4, which asks the interviewees whether special legislation is necessary or not for a problem like marital coercive sex, which has been traditionally regulated by moral rather than legal norms.

Table 19 Question 4 in Yongxing and Dachang

Is special law needed?	
	Count & Percent
Yes	141 47.0%
No	159 53.0%

Table 20 Question 4 in Qingdao:

Is special law needed?	
	Count & Percent
Yes	174 87.0%

Is special law needed?	
No	26 13.0%

Since I did not ask this question in the survey in Shenxian and Pengzhuang, the two villages of Yongxing and Dachang in Shanxi can offer us an example of the rural inland. With the above two tables, we can see remarkable difference between rural inland and coastal city. While as high as 87% of people in Qingdao say “yes” to a marital rape law, more than half, 53%, of people in the villages of Yongxing and Dachang in Shanxi say “no”.

However, there are still 47% of people in rural Shanxi who welcome legal intrusion into the traditional realm of moral norms. Considering the strong conservative tradition in rural China, this ought to be encouraging enough for those who are promoting legal solutions for marital coercive sex. So the data actually suggests that the rural villages of Yongxing and Dachang, though more conservative than the city of Qingdao, are not as conservative as usually expected.

Conclusively, in terms of the acceptance of legal solution of marital coercive sex, there is an obvious difference between rural areas and the cities. In the small coastal city of Qingdao, the percentage of women who would seek for legal protection from marital coercive sex is as high as 67% while in rural inland, about 36-40% of women would do so. With the reluctance of most rural women to start legal actions, marital rape law has the risk to be ineffective in protecting victims of marital coercive sex in rural areas. However, viewed from the other side, since law at least has chance in nearly half of the cases in rural area to protect the victims, the percentage is already a fairly positive message for legal interference into marital coercive sex.

3. The legal nature of marital coercive sex

Most people in cities would choose legal solution of the marital coercive sex problem, and many in the rural areas would do the same. However, what do people usually think about the legal nature of such actions of the husbands? Do they take the actions as criminal? Do people, especially those female victims who would seek legal protections, take marital coercive sex same in nature as the crime of rape? Question 5 and 6 in the questionnaire may provide the concerned information for us.

Table 21 Question 5 in Yongxing and Dachang

Nature of the action	
	Count & Percent
It is the crime of rape, without her consent	19 6.4%
It is not illegal though it is not good	145 48.4%
Common domestic violence, circumstances decide criminality	136 45.2%

Table 22 Question 5 in Shenxian and Pengzhuang

Nature of the action	
	Count & Percent
It is the crime of rape, without her consent	21 6.9%
It is not illegal though it is not good	173 57.5%
Common domestic violence, circumstances decide criminality	107 35.6%

Table 23 Question 5 in Qingdao

Nature of the action	
	Count & Percent
It is the crime of rape, without her consent	28 13.9%
It is not illegal though it is not good	15 7.4%
Common domestic violence, circumstances decide criminality	157 78.7%

As the last choice of “nothing wrong with it” was not taken by anybody, it is not included in the above tables, and I will not discuss this choice but focus on the other three only.

On one hand, rural inland shows an obvious different picture from that in the city of Qingdao in the above three tables. 48.1% of the interviewees in villages of Yongxing and Dachang in Shanxi and 57.5% in Shenxian and Pengzhuang in Shandong think marital coercive sex is not at all illegal, while in Qingdao, only 7.4% take the choice. Such results prove my expectation of the conservative rural inland in contrast with the liberal model of the coastal cities like Qingdao.

However, the rural people also share commonalities on the other hand with the coastal city. The percentage of the people who took the first choice are low compared with that of the third choice in all the three surveys, which is 6.4% to 45% in Yongxing and Dachang, 6.9% to 35.6% in Shenxian and Pengzhuang, and 13.9% to 78.7% in Qingdao. This shows that among those who think marital coercive sex is against the law, only very few people take it as rape in nature, which conceptually refers to intercourse with the lack of consent. In contrast, much higher percentages of people just took it as a form of ordinary domestic violence, and in Qingdao, the percentage is as high as 78.7%.

From this I may arrive at the conclusion that the high percentage of people supporting legal inference into marital coercive sex does not necessarily means the high support for the criminalization of marital rape. Since it is just an ordinary form of domestic violence, whether it is criminal or not is yet uncertain, depending on the specific circumstances in each particular case.²⁴⁹ That's why many people support legal interference for marital coercive sex as domestic violence, not as the crime of rape.

Question 6 confirms the conclusion arrived at from Question 5.

Table 24 Question 6 in Yongxing and Dachang

When it is criminal	
	Count & Percent
As long as the wife says no	30 10.1%
As long as the wife resists	43 14.4%
Only when the wife is physically hurt	190 63.3%
It is never criminal	37 12.2%

²⁴⁹ Art. 260 Whoever maltreats a member of his family, if the circumstances are flagrant, shall be sentenced to fixed-term imprisonment of not more than two years, criminal detention or public surveillance. Criminal Law of the People's Republic of China, China Legal System Publishing House, p221, p223.

Table 25 Question 6 in Shenxian and Pengzhuang

When it is criminal	
	Count & Percent
As long as the wife says no	3 1.1%
As long as the wife resists	31 10.3%
Only when the wife is physically hurt	183 60.9%
It is never criminal	83 27.6%

Table 26 Question 6 in Qingdao

When it is criminal	
	Count & Percent
As long as the wife says no	22 11.1%
As long as the wife resists	31 15.7%
Only when the wife is physically hurt	137 68.5%
It is never criminal	9 4.6%

Among all the different choices, “only when the wife is physically hurt” has always been the one taken by most people in all the three surveys, ranging from 60% to 70%. This might explain the high percentage of people who support legal solutions of marital coercive sex though they do not think it is the crime of rape. These people are worried about the wives’ bodily safety rather than the infringement of their rights of sexual self-determination. They take marital coercive sex, if criminal, not as an independent sexual offense but as a domestic violence causing bodily harm. This is quite different from the understanding about the action of marital coercive sex in the modern marital rape law. Modern marital rape law understands it as the crime of rape, which is sufficiently constituted with the lack of consent. But in the mind of the most interviewees, marital coercive sex is a crime not because of the sex without consent but because of the bodily harm it causes.

4 Interactions between law people and lay people

Many people support legal solution of marital coercive sex for the reasons that they take it as a possible crime of domestic violence not the grievous crime of rape. This is the most common state of mind of lay people. But if the courts deliver the verdict criminalizing marital coercive sex as rape, what reactions will lay people have? This is a crucial question for both the supporters and the opponents of the criminalization of marital rape. Both of them worry that lay people will strongly reject such decision of the courts and the rejection will mean more negative effects resulted from the real enforcement of marital rape law. Questions 8, 9, 10 in the questionnaire are expected to provide the information about the interactions between law people and lay people, which in turn will provide the answer to the most worried question about Chinese marital rape law.

These three questions list out respectively three possible results of legal solution for marital coercive sex, which are

Question 8: the defendant is guilty of rape and sentenced,

Question 9: the defendant is guilty of domestic violence and corresponding punishment is exerted,

Question 10: the defendant is not guilty and the victim asks for divorce.

The interviewees were asked to give their opinions about whether the result is reasonable according to their own judgments. The following three tables are results from Yongxing and Dachang villages in Shanxi.

Table 27 Question 8 in Yongxing and Dachang

Attitudes towards rape verdict	
	Count & Percent
Reasonable	95 31.6%
Unreasonable	132 43.9%
Do not understand how the decision was made	74 24.6%

Table 28 Question 9 in Yongxing and Dachang

Attitudes towards domestic violence verdict	
	Count & Percent
Reasonable	197 65.6%
Unreasonable	72 24.0%
Do not understand how the decision was made	31 10.4%

Table 29 Question 10 in Yongxing and Dachang

Attitudes towards "not guilty & divorce"	
	Count & Percent
Reasonable	213 71.0%
Unreasonable	68 22.6%
Do not understand how the decision was made	19 6.5%

For the "guilty of rape" decision, "unreasonable" was the choice taken by most people, the percentage of which is about 44%. For the guilty of domestic violence decision, "reasonable" is taken by most people, with the percentage of 65.6%. For the "not guilty and divorce" decision, again "reasonable" has the percentage 71%, which is the highest not only among the three choices of the question but also in all the three possible results of the legal solution. Such a high percentage shows a quite common opinion about marital coercive sex, which was repeatedly encountered during my survey: "Well, if she does not want to have sex with him, go and divorce. Charge him with rape? Imprisonment? That's too much!"

I may get two conclusions from the above results in Yongxing and Dachang villages. First it is well confirmed that the high percentage of people supporting legal solution of marital coercive sex does not mean the high percentage of people supporting marital rape law. On the contrary, the high supporting rate of "not guilty and divorce" shows the marital exemption of rape is still deeply rooted in people's mind nowadays in the rural areas like Yongxing and Dachang. Secondly, other than

the worries about the bodily harms to the wives, divorce as a legal solution is another reason why so many people support the legal interference into marital coercive sex.

However, given a closer look at the data, we may find something more, which is encouraging to marital rape law. In Questions 9 and 10, the distributions of the choices taken are quite uneven, with the majority clustering to the only one choice of “reasonable”. In contrast, in Question 8, interviewees are relatively more scattered around all the choices. The contrast between the clustered distributions to one choice in Questions 9 and 10 and the scattered distributions to all choices in Question 8 shows that not all the people supporting marital exemption of rape take opposing positions when they are confronted with it in Question 8. Though people show their support to the traditional marital exemption of rape with the high percentages of “reasonable” choice in Questions 9 and 10, however, they do not do so by giving as high percentage of “unreasonable” choice in Question 8. In Question 8, the “unreasonable” percentage of 44% is the highest but the differences are minor compared to either 31.6% of “reasonable” or 24.6% of “I do not understand how”. This means that part of the high percentages taking “reasonable” choices in Questions 9 and 10 move in Question 8 not to the “unreasonable” choice but to the one of “I do not understand how”, taking a possible “give me acceptable explanations and I may accept it” position.

So according to the data, though they are still supporting marital exemption of rape as they have traditionally been, even the people in rural areas like Yongxing and Dachang villages may not firmly close the door to accepting different or even opposite ideas. Especially when the legal authorities like the courts show a supporting attitude towards the criminalization of marital rape, not every traditional mind takes a complete rejection attitude. Instead, some of them quickly change their mind and follow the authority to find criminalization of marital rape reasonable. And some of those who take the hesitating position may also imply a possibility of change of mind. Such interaction between law people and lay people leaves the chance for the criminalization of marital rape to be accepted in the rural inland.

I found similar results in Pengzhuang and Shenxian as well.

Table 30 Question 8: in Pengzhuang and Shenxian

Attitudes towards rape verdict	
	Count & Percent
Reasonable	80 26.8%
Unreasonable	152 50.8%
Do not understand how the decision was made	67 22.4 %

Table 31 Question 9 in Pengzhuang and Shenxian

Attitudes towards domestic violence verdict	
	Count & Percent
Reasonable	178 59.3%
Unreasonable	96 32.0%
Do not understand how the decision was made	26 8.7%

Table 32 Question 10 in Pengzhuang and Shenxian

Attitudes towards "not guilty & divorce"	
	Count & Percent
Reasonable	189 63.0%
Unreasonable	96 32.0%
Do not understand how the decision was made	15 5.0%

But the coastal city of Qingdao always has its different performance.

Table 33 Question 8 in Qingdao

Attitude towards rape verdict	
	Count & Percent
Reasonable	140 70.1%
Unreasonable	24 12.1%
Do not understand how the decision was made	36 17.8%

Table 34 Question 9 in Qingdao

Attitudes towards domestic violence verdict	
	Count & Percent
Reasonable	78 38.9%
Unreasonable	100 50.0%
Do not understand how the decision was made	22 11.1%

Table 35 Question 10 in Qingdao

Attitudes towards "not guilty & divorce"	
	Count & Percent
Reasonable	160 79.6%
Unreasonable	17 8.3%
Do not understand how the decision was made	24 12.0%

The acceptance rate of rape verdict is as high as 70% in Qingdao and this well fits with its image of liberal coastal city, where modern ideas are always better accepted. In Question 9 about the attitude to the domestic violence verdict, Qingdao, compared with rural areas, has a relatively lower percentage of "reasonable" choice and higher percentage of "unreasonable" choice. This might be the exhibition of the people's awareness in Qingdao to distinguish marital rape as an independent sexual offense from ordinary domestic violence, which could be the results of the heated discussions about marital since the beginning of the year 2000.

However, while they accept the marital coercive sex as the crime of rape, people in Qingdao also accept the not guilty decision of the court with the percentage as high as 79.6%, which looks quite paradoxical. The paradox might be the normal reflection

of common people's dilemma. Under the influence of massive media discussion about marital rape, city people like those in Qingdao may have some ideas about the legal concept of marital rape and its difference from ordinary domestic violence. That may be why they made a distinction between Question 8 and 9 as they know official law would make decisions of the kind. But traditions remain in mind and of course they also find the "not guilty and divorce" result in Question 10 equally acceptable, which consequently comes out with even slightly higher percentage than the "reasonable" choice for rape verdict in Question 8.

The following conclusions at least seem reliable: in the coastal city of Qingdao, there are signs that rape verdict for the marital coercive sex from the court are more accepted than in the rural areas. But at the same time enduring old ideas also stay on with its remaining power in this medium-sized city.

A comparative study between Question 5 and Question 8 may describe an even clearer picture of the interactions between law people and lay people.

Table 36 Comparative study between Question 5 and Question 8

	People taking "rape" choice in Question 5	People taking "reasonable" choice in Question 8
Yongxing and Dachang	19 6.4%	95 31.6%
Shenxian and Pengzhuang	21 6.9%	80 26.8%
Qingdao	28 13.9%	140 70.1%

In Question 5, interviewees are asked plainly for their own uninterrupted personal opinions about the nature of marital coercive sex. Remarkably low percentages of interviewees regard the actions as the crime of rape. In Question 8, interviewees are asked for their attitudes towards the rape verdict from the court for marital coercive sex. This is in fact to ask the interviewees to reconsider their opinions about marital coercive sex under the pressure from the legal authorities. We see remarkable changes in all the three surveys. In Yongxing and Dachang, the difference between 6.3% and 31.6% shows that 25.3% of the interviewees did not regard marital coercive sex as rape but then changed their mind to agree with the court. In Shenxian and Pengzhuang, 20% interviewees changed mind under pressure while, in Qingdao, 46% interviewees did so.

We may now have a clearer picture about the social consequence of the criminalization of marital rape. There are a large number of people who stick to the traditional ethics and would firmly reject marital rape law. These would be about half of the people in Yongxing and Dachang as well as Shenxian and Pengzhuang.

On the other hand, in coastal cities like Qingdao, it is clear that people have been quite ready to accept it when the court finds the perpetrators of marital coercive sex guilty of rape. Even in the rural areas like Yongxing and Dachang villages, 20% or more people would easily accept the criminalization of marital rape if the court does so. And those who have not decided, 24.6%, are also not firm opponents of but have the chance to accept the criminalization of marital rape. Together they would make up the other half of the population. So, favorable and unfavourable attitudes towards the operation of marital rape law, if carried out, are about half and half.

5 Social effects on the victims by legal actions

There is a common worry in China that victims of marital rape are reluctant to report the matter because of the social consequences of doing so.²⁵⁰ Many people assume that traditional family ethics are dominating current Chinese society and traditional Chinese ethics are strongly against criminalizing husbands' coercive sex against the wives. Accordingly, whoever charges her own husband with marital rape will be ostracized by society as unreasonable or even inhuman.²⁵¹ Since the victim's action breached, as Durkheim said, the collective conscience resulted from "the social solidarity",²⁵² a sort of informal social sanction is imposed upon her. She would find herself under an awkward condition in her community or even been banished in some degree: people do not want to be associated with her; she would lose not only her husband but also her friend, even her relation with her own parents' family might be worsened.²⁵³ A woman living in such an environment is not much better than her rapist who lives in prison.

If there is the potential that the victim has more to lose from a marital rape law than gain, one would expect this to be an important barrier to the effective operation of marital rape law. Question 7, asking people of their attitude towards wives who accuse their husbands of rape, may help to find out if there is such a barrier.

Table 37 Question 7 in Yongxing and Dachang

Attitude towards the wife	
	Count & Percent
Support completely	70 23.4%
Support her to divorce, not accuse him of rape	121 40.4%
She is absurd and ignorant about law	53 17.6%
She is inhuman and he is sympathized	33 11.2%
Others	22 7.4%

Table 38 Question 7 in Shenxian and Pengzhuang

Attitude towards the wife	
	Count & Percent
Support completely	41 13.8%
Support her to divorce, not accuse him of rape	124 41.4%
She is absurd and ignorant about law	52 17.2%
She is inhuman and he is sympathized	83 27.6%

In rural areas, obviously, most people support the wives only when they apply for divorce but not accusing him of rape. Close percentages of this choice are found in the two different provinces of Shanxi and Shandong: 40.4% in Yongxing and Dachang villages in Shanxi and 41.4% in Shenxian in Shandong.

²⁵⁰ See: Cai Dongtong, See "Jurisprudential Research into Marital Rape" *Criminal Law Review*, vol.10, 2002, p550; Zhou Huashan and Zhao Wenzong, "On Feminism and Post-colonialism --- Rereading Chinese Marital Rape Law", *The Frontier of Law*, vol. 3, 1999, p52-74.

²⁵¹ Ibid.

²⁵² Emile Durkheim, *The Division of Labor in Society*, trans. by W. D. Halls, Free Press, 1984.

²⁵³ Suli, *The Rule of Law and its Local Resources*, China Politics and Law Press, 1996, p23.

People who would possibly have unfriendly attitudes towards wives accusing their husbands of rape have in general the second highest percentages. People taking the choice of either the third or the fourth may be unfriendly to the wives, and the sum of the percentages of the two choices make up to 28.8% in Yongxing and Dachang villages in Shanxi and even 44.8% in Shenxian and Pengzhuang in Shandong. These people are who may increase the cost of the victims to seek legal solutions.

Table 39 Question 7 in Qingdao

Attitude towards the wife	
	Count & Percent
Support completely	113 56.5%
Support her to divorce, not accuse him of rape	41 20.4%
She is absurd and ignorant about law	17 8.3%
She is inhuman and he is sympathized	13 6.5%
Others	17 8.3%

At this point, Qingdao again demonstrates its differences from the rural areas. With 56.5% people completely supporting the wives charging the husbands of rape, it has much higher percentage than the rural areas, either 23.4% in Yongxing and Dachang or 13.8% in Shenxian. And the total number of the possible unfriendly people make up only to 14.8%, which is much lower than the rural inland. This shows that the victims' costs seeking protections from marital rape law, as mentioned above, are much less in cities like Qingdao.

6. Spread of marital rape in China as a new legal concept

So far we should have had some ideas about all the different attitudes towards marital coercive sex in current Chinese society. It is assumed that all the different opinions and disagreements show that the spread of marital rape as a modern legal concept is still in process in China.²⁵⁴ Where this modern concept has been accepted and the traditional Chinese ethics eroded, people would have a rather positive attitude towards marital rape law. And where traditional Chinese family ethics is still stuck with, people would have negative attitudes towards marital rape law.²⁵⁵

Data have been collected in the surveys concerning how the spread of the legal concept of marital rape is conducted in the current Chinese society.

Question 12: Have you heard the term "marital rape" before?

Table 40 Question 12 in Yongxing and Dachang

Have you heard of marital rape before	
	Count & Percent
Yes	149 49.7%
No	151 50.3%

Table 41 Question 12 in Shenxian and Pengzhuang

Have you heard of marital rape before	
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²⁵⁴ Zhou Huashan, "Research on the Localization of Marital Rape Law", Zhejiang Academic Journal, vol. 2, 1999.

²⁵⁵ Ibid.

	Count & Percent
Yes	131 43.7%
No	169 56.3%

Table 42 Question 12 in Qingdao

Have you heard of marital rape before	
	Count & Percent
Yes	161 80.6%
No	39 19.4%

In Yongxing and Dachang villages in Shanxi, 49.7% people have heard of the term of marital rape while 50.3% haven't. In Shenxian county and Pengzhuang village in Shandong, 43.7% have while 56.3% haven't. The rural data are much closer to each other with only slight differences in between. There is a smaller number of people in Shenxian who have heard of the term than those in the two villages in Shanxi. This difference conforms to the slightly more conservative performance of Shenxian and Pengzhuang than the Shanxi villages in the surveys.

Qingdao, as a city in coastal area, is again quite different. There are as many as 80.6% of people who have heard of the term "marital rape", and only less than 20% who haven't. This conforms to the liberal performance of Qingdao people in the survey.

With the conformity between the number of people who have heard of marital rape and their attitudes towards marital coercive sex in all the surveys, we might possibly be able to conclude that the more chance people get in contact with the idea, the better chance they might accept it.

Let me go on with the means by which the new legal concept spread itself.

Question 13: What is the source from which you heard about marital rape?

Table 43 Question 13 in Yongxing and Dachang

Sources of information							
			Television	Newspapers and magazines	The Internet	People around	Others
Have you heard of marital rape before	Yes	Count & % within have you heard of marital rape before	17 11.7%	97 64.9%	2 1.1%	22 14.9%	11 7.4%

Table 44 Question 13 in Shenxian and Pengzhuang

Sources of information							
			Television	Newspapers and magazines	The Internet	People around	Others
Have you heard of marital rape before	Yes	Count & % within have you heard of marital rape before	30 22.6%	76 58.1%	0 0%	30 22.6%	4 3.2%

Table 45 Question 13 in Qingdao

Sources of information							
			Television	Newspapers and magazines	The Internet	People around	
Have you heard of marital rape	Yes	Count & % within have you heard of marital	41	59	37	35	

before	rape before	25.2%	36.7%	22.9%	21.8%
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First we can see from the tables that in cities like Qingdao people have easier access to different sources of information than the rural people. This can be shown by differences between the percentages in the surveys. In Qingdao, the percentages of each choice are quite close to each other. The highest percentage is 36.7% of newspapers and magazines while the others are all between 21-26%. In rural areas, the percentages have much bigger differences. In Yongxing and Dachang villages in Shanxi, the difference is the highest percentage of 64.9% people to read newspapers and magazines against the lowest percentage of 1.1% people who surf the Internet. In Shenxian and Pengzhuang in Shandong, the difference is the highest of 58.1% versus the lowest of 0% or 3.2%.

Secondly, newspapers and magazines are the most important sources of information in both rural areas and cities. They are the sources of information about marital rape for 64.9% people in Yongxing and Dachang villages and 58.1% in Shenxian and Pengzhuang. Even in Qingdao, newspapers and magazines are also the sources for the largest group of people: 36.7%.

The Internet has a quite different status. As many as 22.9% of Qingdao people get their information about marital rape from the Internet while only 1.1% do so in Yongxing and Dachang villages and no one in Shenxian county and Pengzhuang village. So, the Internet functions mainly in cities as the effective media to spread information about marital rape while rural people cannot have easy access to it.

Televisions and people around are also fairly effective sources of information about marital rape. Though the percentages of people using them are not as high as newspapers and magazines, they are quite stable in all the surveys, especially compared with the Internet.

7. Determinants on successful spread of marital rape as a new legal concept

The above data is about the particular means by which people obtain the information of marital rape as a new legal concept and a new thought. But awareness of it does not necessarily mean that people will accept it. Only after people have accepted a new idea or thought can we say that the spread of it is successful. In this section I will see what factors decide the successful spread of the new idea of marital rape in China.

From all the discussions above, readers should have seen the much better acceptance of marital rape in cities like Qingdao than that in rural villages and county towns. The reason I make special comparisons between urban and rural areas is superficially because of the geographical differences between them. But the geographical differences between them actually mean the different chances for people to be exposed to the new ideas of marital rape coming from the foreign lands. The greater chance that city people have to come into contact with the information ought to have contributed to the better acceptance of the idea of marital rape. In contrast, rural people are usually closed off from such information, and are therefore less likely to be influenced. That is to say, pure chance of exposure to such an idea is in itself a determining factor on the successful spread of this idea. The greater the chance there is of coming into contact an idea, the greater the chance there is of the idea being accepted. And vice versa. The general difference between the cities and the countryside should be a piece of evidence proving it.

The second determining factor can be found from the answers to Question 11 in the questionnaire.

Table 46 Question 11 in Yongxing and Dachang

Who are the most trustworthy	
	Count & Percent
Government officials	10 3.2%
Senior family members	32 10.6%
Pop stars	6 2.1%
Scholars	32 10.6%
Judges or lawyers	213 70.9%
Others	8 2.6%

Table 47 Question 11 in Shenxian and Pengzhuang

Who are the most trustworthy	
	Count & Percent
Scholars	29 9.5%
Judges or lawyers	260 86.5%
Others	12 4.1%

Table 48 Question 11 in Qingdao

Who are the most trustworthy	
	Count & Percent
Government officials	6 2.8%
Senior family members	11 5.6%
Pop stars	2 .9%
Scholars	6 2.8%
Judges or lawyers	167 83.3%
Others	9 4.6%

Without exception, in all the three tables, judges or lawyers are taken with remarkably high percentages as the most trustworthy people for the understanding of marital coercive sex. This suggests the person who is spreading the idea of marital rape has great influences on the chance of success of the spread of the idea. And if judges or lawyers are telling people that criminalizing marital rape is right and reasonable, there will be much greater chance for the idea to be accepted.

Education is usually one of the most important factors that will influence an individual's outlook on the world. How much influence would it exert on a person's attitude towards marital coercive sex? Question 5 is the most direct question asking about people's opinion about marital coercive sex. Answers to Question 5 by different education levels may provide the needed information.

Table 49 Education * nature of the action in Yongxing and Dachang

		It is the crime of rape, without her consent	It is not illegal though it is not good	Common violence, decides	domestic circumstances
Illiterate	% within education		100.0%		
Primary school	% within education	7.7%	69.2%	23.1%	
Junior high school	% within education	1.8%	50.9%	47.4%	
Senior high school	% within education	2.9%	45.7%	51.4%	
University and higher	% within education	23.8%	19.0%	57.1%	

Table 50 Education * nature of the action in Shenxian and Pengzhuang

		It is the crime of rape, without her consent	It is not illegal though it is not good	Common violence, decides	domestic circumstances
Illiterate	% within education		100.0%		
Primary school	% within education		75.0%	25.0%	
Junior high school	% within education	5.1%	53.8%	41.0%	
Senior high school	% within education	6.7%	60.0%	33.3%	
University and higher	% within education	18.8%	50.0%	31.3%	

Table 51 Education * nature of the action in Qingdao

		It is the crime of rape, without her consent	It is not illegal though it is not good	Common violence, decides	domestic circumstances
Primary school	% within education		100.0%		
Junior high school	% within education	33.3%	16.7%	50.0%	
Senior high school	% within education	10.6%	6.1%	83.3%	
University and higher	% within education	13.3%	6.7%	80.0%	

In the two rural tables, education show a sign of being influential. In the column of "it is the crime of rape without her consent", "university and higher" has higher percentages than all the others: with 23.8% to 7.7%, 1.8%, 2.9% and 0% in Yongxing and Dachang and 18% to 6.7%, 5.1% and 0% in Shenxian and Pengzhuang. Also, all the illiterate people think marital coercive sex is not illegal. However, either 23.8% or 18% is not a large percentage within the "university and higher" people. So, from the rural perspective, education does make some differences but not very big ones.

In Qingdao, the "university and higher" does not seem to be much different from other education levels. Instead, it is the "junior high school" that has the highest percentage of people who recognize the crime of marital rape. Therefore, if we consider comprehensively both the cities and the countryside, we cannot conclude that education as an independent factor exerts evident influences on people's opinion about marital rape.

Age is observed as a possible determining factor. No obvious signs are found about its influences on the attitudes towards marital rape.

Table 52 Age * nature of the action Crosstabulation in Yongxing and Dachang

		It is the crime of rape, without her consent	It is not illegal though it is not good	Common domestic violence, circumstance decides
18-25	% within age	25.0%	37.5%	37.5%
26-30	% within age	.0%	37.9%	62.1%
31-40	% within age	2.1%	52.1%	45.8%
41-50	% within age	4.1%	61.2%	34.7%
above 50	% within age	17.1%	40.0%	42.9%

Table 53 Age * nature of the action Crosstabulation in shenxian and Pengzhuang

		It is the crime of rape, without her consent	It is not illegal though it is not good	Common domestic violence, circumstance decides
18-25	% within age	.0%	33.3%	66.7%
26-30	% within age	15.4%	61.5%	23.1%
31-40	% within age	6.0%	58.0%	36.0%
41-50	% within age	.0%	60.0%	40.0%
above 50	% within age	33.3%	66.7%	.0%

Table 54 Age * nature of the action Crosstabulation in Qingdao

		It is the crime of rape, without her consent	It is not illegal though it is not good	Common domestic violence, circumstance decides
18-25	% within age	13.6%	2.3%	84.1%
26-30	% within age	20.0%	5.7%	74.3%
31-40	% within age	5.6%	16.7%	77.8%
41-50	% within age	.0%	100.0%	.0%
above 50	% within age	100.0%	.0%	.0%

As the people with the experiences of marriage are who have greater influences on marital rape law and the young people with no experiences of marriage have slight influences on the legal problem, research into the different attitudes of the people with different marital status will not be conducted.

2.4.4 Conclusions

In China, people have different ideas about marital coercive sex. Comparatively, people in the cities are more agreeable with the concept of marital rape than those in the rural areas. While the urban people are dominating economically and politically, the rural people are dominating in the number of population. Therefore, with the different or even opposing attitudes towards marital coercive sex between the two, it is hard to say the opinion of which is dominating in the whole Chinese society so as to be called as the current *Chinese attitude* towards marital coercive sex.

However, though rural people have been well known for their conservative attitudes to marital rape, they are actually not as conservative as many scholars have expected. The number of people who have accepted the idea of marital rape is higher than usually expected. And there are also a number of people who, though presently having no or having negative opinion about marital rape, are ready to accept the explanations given by legal authorities like the judges or the lawyers. These two groups of people added up together surpass half of the population, and marital rape law therefore does not have so unfavorable social environment to operate in as expected.

Survey results also show that there are two factors that exert great determining effects on people's acceptance of the idea of marital rape. The first is the chance they get to know about the idea and are given the reasons for it. The second is the authoritative sources of information. Given the common people's traditional respect and trust in authorities in China, the attitude of the legal authorities can play an important role in deciding the common people's attitude towards marital rape.

Chapter 3 Marital Rape in China ---

Analysis & Conclusions

In this chapter, I will analyze the empirical data collected in the last chapter. I will first analyze them from the perspective of the current culture approach to see what it can bring and what it cannot bring to the legal problem of marital rape. Then, I will construct a new approach for culture and law studies, the memetic approach. Hopefully, this new approach will address the problems identified for the traditional analysis concerning Chinese marital rape law. Different results in handling the same legal problem may demonstrate the respective advantages and disadvantages of the two approaches.

3.1 Analysis with the current culture approach

3.1.1 Opponents and the empirical evidence

The fundamental reason for the opponents of the criminalization of marital rape is the special relationship of rights and duties that marriage creates between husband and wife. The special relationships of rights and duties between husbands and wives also grant legal specialty to the marital sexual relationship, which could therefore be different from sex between men and women with no marital relations.²⁵⁶ According to this point of view, sex is the legal duty of marriage, the performance of which neither of the parties should refuse. Husbands therefore have the right to have sex with wives and need not to ask for consent every time before sexual intercourse. Otherwise, it will be a violation of the special cohabitation duty of marriage. Accordingly coercive sex between husbands and wives does not constitute the crime of rape and rape can only be of extramarital nature.²⁵⁷

The special relationship of duties and rights between husbands and wives is at the root of the marital exemption of rape. However, such a legal specialty of marriage is not derived from any superior legal concepts or rules; rather it is only the reflection of the social reality of marriage. That is, what people perceive marriage *should* be like. These thoughts and ideas of people are what are usually known as family ethics, or to be exact in traditional Chinese society, the Confucian family ethics.²⁵⁸ Therefore the ultimate cause of the marital exemption of rape is the ethical ideas about family, ideas that are expressed in the social realities. These ethical ideas are of course what we usually call cultural elements.

²⁵⁶ Shao Shixing, "Analysis of the Duties of Cohabitation and Loyalty between Husbands and Wives", Law Review, vol. 1, 2001, p110.

²⁵⁷ Ibid.

²⁵⁸ For example, "Three Obeys" is the basic ethical duty of a woman according to Confucian teachings, which means a woman should "obey her father before marriage; obey her husband after marriage; obey her son after the death of her husband." The "Three Obeys" principle is non-legal but lays down the fundamental basis of traditional Chinese marriage law concerning women's status in family.

Cultural elements as the ultimate root had not only started the marital exemption of rape in the first place in traditional Chinese society but are still used by people in modern China as arguments against the criminalization of marital rape in the debates in the year 2000. According to the comments previously quoted on the Shanghai Case by the Supreme People's Court of: "Though it is not seen in the clear or mandatory prescriptions of law, the duty is deeply rooted in the ethical ideas of people and therefore proclamation in the writing of law is not necessary. This is also why generally the act of marital coercive sex cannot be taken as the crime of rape in the judicial practice."²⁵⁹

So, according to the Supreme Court, the "no rape in marriage" principle stems not from the written law but from the "ethical ideas of people", which are part of traditional Chinese culture. Why, then, does the Supreme Court follow the "ethical ideas of people" instead of the law? Dr. Fu Liqing may have depicted a picture that well explains the reason and also well reflects the common contradictory attitude of many people in China towards marital rape.

"Marital coercive sex ought to bring in a guilty verdict of rape. But this is only what it *ought to be* or only the wishes of people. Being established in the social realities, we will find the problem not that simple and we may eventually have a completely different answer for it".²⁶⁰

This is a typical state of mind presently in China about marital rape. It is widely agreed that it *ought to be* the crime of rape but unfortunately you just *can't make it be*. And the reason given for this is always the traditional Chinese family ethics.

"Though marital rape does indeed meet all the constitutive requirements of the crime of rape, however, still, should we thus explicitly criminalize it under the present social conditions? Though it is indeed the worldwide trend to criminalize marital rape, however, still, should we thus mechanically follow suit?"²⁶¹

The answer given by Dr. Fu is a definite "no": "With thousands of years of feudalist tradition in our country, the ideas of male sexism have taken strong root. All the special conditions of China have decided that we cannot blindly and mechanically imitate the foreign countries when defining crimes".²⁶² Otherwise, we will have to "pay high prices" to catch up with the fashion of just being "modern".²⁶³

What, then, are these "high prices"?

The first, so goes the argument, is that the law will not work.²⁶⁴ As we have seen in the previous chapter, even though the law criminalizes marital rape, it has no practical effects because people will not accept it. Courts may not follow the legislation; victims may sidestep the law for other solutions, etc.

Secondly, the law criminalizing marital rape may take away what people see as legal rights and force upon them the rights that they do not see as rights, and the

²⁵⁹ No. 1 Criminal Division, Supreme People's Court: *Reference to Criminal Trial*, Vol 2, 2000, p 28.

²⁶⁰ Fu Liqing, "Marital Rape Should Wait--Between To Be and Ought To Be", *Cases and Judicial Interpretations of Criminal Law*, vol. 4, p416. Or the website: chinalawinfo.com/xin/disxwpl.asp?code=129&mark=1504 (2002/2/11).

²⁶¹ *Ibid.*

²⁶² *Ibid.*

²⁶³ *Ibid.*

²⁶⁴ *Ibid.*

duties that they do not see as duties. Thus, in terms of the Confucian ethics there, the law would be seen not as just but as unjust, not as reasonable but as unreasonable.²⁶⁵

Thirdly, the law criminalizing marital rape would ruin the stable family relations that have been long been associated with Confucian ethics. Thus by ruining families, the basic cells of the society, the law, instead of protecting, would go on to damage the order of the whole society.²⁶⁶

Therefore, "I would say, under current social background, decriminalizing marital rape, though not a good choice, is a rational choice".²⁶⁷

Obviously, people who object to the criminalization of marital rape believe that the Confucian family ethics still overwhelmingly dominate the contemporary society. It is upon this belief that they base their claims. However, throughout their arguments, the opponents of the criminalization of marital rape do not provide any empirical evidence to confirm their assumed cultural reality in the present society. This is what the previous surveys are for: to provide the indispensable evidences and to testify their claim with empirical works.

Unfortunately the empirical data does not support the claim of the people against the criminalization of marital rape. According to the surveys, the number of people who have accepted the idea of marital rape is higher than usually expected. And there are also a number of people who, though presently having no or having negative opinion about marital rape, are ready to accept the explanations given by legal authorities like the judges or the courts. These two groups of people added up surpass half of the population, and marital rape law therefore does not have so bad cultural environment to operate in as claimed by the opponents.

By falsifying the basic assumptions of the opponents of the criminalization of marital rape, the empirical data has also revealed their methodological problems. The opponents ignore the live cultural elements in reality, and just simplify the live culture into a general notion of Confucian ethics. By doing so, they are just taking for granted the Confucian ethics' absolute dominating position in people's mind and they just suppose that people's mind are filled with nothing else but pure Confucian ethics as guidance to their attitudes towards marital rape. By doing so, they have in fact substituted the pure dogmas of Confucianism for the lively social realities. And therefore their argument may not be as plausible as claimed.

3.1.2 Supporters and the empirical evidence

How about the supporters then? Does the failure of the opponents mean the supporters of the criminalization of marital rape face no problems?

As previously said, there are so far in China no supporters of complete criminalization of marital rape. Those who have gone the furthest support only the partial criminalization of it. These people argue that though it *cannot* be criminalized due to the social factors in reality, marital rape, however, *ought to* be criminalized. Why marital rape ought to be criminalized, according to the supporters, is essentially

²⁶⁵ A useful example is provided by Suli in his discussions about Qiuju's puzzle. Qiuju is a woman in the typical Chinese village, whose husband was injured on his private part in an argument with the head of the village. Qiuju tried her best to get the involvement of the court for what she called the "justice" of the settlement of the dispute. As the result of the involvement of the official law, the head of the village was detained for 15 days. But Qiuju is shocked and puzzled by the result because this is not the "justice" she expected. She argued with the police: "How can you ARREST him for a quarrel? I only want my justice not his arrest." See Suli, *The Rule of Law and its Local Resources*, China Politics and Law Press, 1996, p23.

²⁶⁶ Fu Liqing, "Marital Rape Should Wait--Between To Be and Ought To Be", *Cases and Judicial Interpretations of Criminal Law*, vol. 4, p416. Or the website: chinalawinfo.com/xin/disxwpl.asp?code=129&mark=1504 (2002/2/11).

²⁶⁷ Ibid

for the reason of the innate rights and liberties of every human being. Since they are inalienable, the innate rights and liberties of women as equals to men ought not to be lost after marriage. According to this group of people, sexual self-determination is the inalienable rights of every adult. And marriage does not necessarily mean that the wife loses her independent rights of sexual self-determination by giving herself up to her husband with the mutual matrimonial consent which she cannot retract. Therefore, with the innate rights of the wife remaining intact after marriage, the husband's coercive sexual actions without her consent are not different in nature from the actions of any male against a female who has no marital relation with him. As a result, marital coercive sex is equally criminal and a husband can commit the crime of rape against his wife.

So, the modern idea of women's rights notion has played an essential role in the criminalization of marital rape in China.²⁶⁸ In the past, it was the acceptance of these western-originated values that started the possibility of the legislative criminalization of marital rape. When Chinese law prescribed a woman for the first time as a "natural person" possessing the same rights and obligations as a man in the 1929-30 civil code, it emerged as the results of the legislators' acceptance of gender equality, which came from the west.²⁶⁹ And now, these borrowed values are used by the current Chinese supporters of criminalization of marital rape in the recent debates as arguments against their opponents.

"The criminalization of marital rape has the value that transcends the eastern and western parochialism. The legal proscription of marital rape firstly originated in the west but its origin does not make it only the "parochial knowledge" of the west. The protections and concerns over women's autonomous sexual self-determinant rights expressed in the law ought to be common to all human civilizations and ought to be the necessary exhibition of the notion of human rights and legality in the modern time. Therefore, the criminalization of marital rape should not only be western but also eastern, or to be exact, should be of all human beings".²⁷⁰

So, people holding the same opinion with Professor Cai have based themselves on the values of innate human rights of women, including women's rights of sexual self-determination. In the eyes of the supporters, the criminalization of marital rape is demanded by the universal, absolute and capitalized truth. In Professor Cai's term, the values of innate human rights of women are the "capitalized truth": "if the capitalized truth does exist in law, then these (protections of basic human rights like women's sex rights) are the indispensable contents of the *capitalized rights*".²⁷¹

However, universal as it might be, the notion of human rights is an abstract concept. Law, as Zweigert and Kötz, functions to solve the practical problems of life. To derive from a pure abstract concept the conclusions about practical tool like can be quite problematic because pure derivation from an abstract concept could entail very far-reaching consequences. For instance, conceptually, any intercourse, as long as the

²⁶⁸ See Li Yinhe, *The Rise of Women's Power*, Culture and Art Publishing House, p116, p117, p123-124. According to Professor Li, as for the start of Women's Right Movement, the 17th century Mary Astell was a representative pioneer in Britain(p116) while Marie Gouze with her first "Declaration of the Rights of Woman and the Female Citizen" ("*Déclaration des droits de la Femme et de la Citoyenne*") in the world in 1791 made the mark in the European continent(p117). And the talk about China's Women's Right Movement is impossible without mentioning the Western influences(p123-124).

²⁶⁹ See Chapter 3.3.2 (1. Legislators) of the thesis for detailed analysis of legislative background.

²⁷⁰ Cai Dongtong, See "*Jurisprudential Research into Marital Rape*" *Criminal Law Review*, vol.10, 2002, p502.

²⁷¹ *Ibid.*

man knows that it's against the will of the woman, is rape. So, if the wife says "no" to the husband, which is of course an explicit expression of refusal, the intercourse thereafter is rape. But this is not necessarily true even in the west, where the women's rights notion originated. In some western jurisdictions, even now, long after marital rape was criminalized, "no" is not sufficient and some form of violence is required.²⁷²

What this tells us is that an abstract concept must be embedded in the social reality before it can be operational in legal practice. The women's rights-based argument therefore must be restricted by a broader cultural framework in the present Chinese society. That is, women's rights notions must stop being pure abstract and become live elements accepted by people into the social reality.

But the surveys seem to have shown that such a concept is not yet embedded in social reality. Question 6 in my surveys asks about when the husband's action of coercive sex against his wife is criminal. The choice of "when the wife says no" has the lowest percentages in Yongxing and Dachang (10.1%) as well as Shenxian and Pengzhuang (1.1%), and the second lowest in the city of Qingdao (11.1%). Meanwhile, the choice of "when physically hurt" has always the highest percentages in all the three surveys. The results suggest that, apart from those in the three biggest cities, most Chinese people accept the criminalization of marital rape not because they have accepted the human rights-based arguments but because of their care about the wife's physical safety and their instinctive abhorrence of violence. If the criminalization of marital rape is to be supported, the argument will be more convincing to contemporary Chinese people if based on the realistic abhorrence of violence of people instead of the abstract notion of human rights. This is why the legislative criminalization of marital rape, which is derived from women's rights notions, fails to be effective in the current social environment.

Empirical research thus tells us why women's rights-based criminalization of marital rape failed to operate. It also tells us the methodological problems of the women's rights-based supporters of the criminalization of marital rape. Same as the opponents, the supporters of the criminalization of marital rape do not provide sufficient empirical evidence to support their argument. Apart from the surveys in Beijing, Shanghai and Guangzhou, the most of what they do is to derive from the pure notion of women's rights their conclusions of the criminalization of marital rape. They do not care about the rejections by those who accept the ideas of Confucian ethics to what they take as universal and absolute and the possible ineffectiveness of the law caused by the rejections of these people to criminalize marital rape. Instead, they just ignore them and reject right back. By doing so, the supporters of the criminalization of marital rape have discarded the social reality and substitute their abstract dogmas for it. Several dogmas of their own believed notion are solely sufficient for them to have their conclusions drawn about marital rape law. Here we see the same methodological problems that the opponents of the criminalization of marital rape also have.

²⁷² For example, on 22nd of March 2001, at the High Court in Aberdeen, Lord Abernethy ruled that there was no evidence that force had been used against a young woman who had accused a fellow student of repeatedly raping her. In his ruling, Lord Abernethy stated that, for a charge of rape to be proved, there had to be evidence of either force or threat of force being used. He stated that to have sexual intercourse with a woman without her consent is in itself not rape, contrary to any common perception that lack of consent is enough for a charge of rape. See "*The Legal Definition of Rape*", Research Note, RN01/46, 23 April 2001, The Scottish Parliament Information Center, at http://www.scottish.parliament.uk/S1/whats_happening/research/pdf_res_notes/rn01-46.pdf. For more concerning the question of forcible violence in the definition of rape in Scots law, see also: *Lord Advocates Reference* (No 1 of 2001) 2002 SLT 466; P. W. Ferguson, "The Definition of Rape", 2002 SLT(News), 163.

3.1.3 Common methodological features

Whether for or against the criminalization of marital rape, each side starts from their own cultural grounds to choose their perspective on law and society, and to arrive at their own conclusions about laws of marital coercive sex problem. With the opposing cultural elements as starting points, they inevitably arrive at opposing conclusions. In the reasoning processes, we see on both sides the typical characteristics of culture approach in legal studies.

The first characteristic is that the approach always has the concept of culture as its most basic foundation of reasoning. All their arguments can be traced down eventually to a certain culture as the basic premise. For example the opponents of marital rape law have the traditional Chinese family ethics while the supporters have the notion of women's human rights.

Secondly, the concept used as the foundation of current culture approach is always a *general* and *homogeneous* one.²⁷³ Though cultural elements are just ideas, beliefs, etc. held in the mind of each human individual, yet, the current culture approach, once it has chosen certain cultural elements as arguments, does not seem to care much about the complexity of individual minds. Instead, it always tries to make their chosen cultural elements cover all of society as if their chosen cultural elements are general to the mind of every human individual. The opponents of marital rape law therefore virtually see only the dominating traditional Chinese ethics while the supporters see only the absolute human rights values.

The reason why current culture approach can just ignore the individual minds, where the cultural elements really reside, is because of its third characteristic, i.e. it views culture as a reified entity. Tylor defines culture as a "complex", which is made up of knowledge, belief, art, morals, law, custom, etc.²⁷⁴ Cotterrell defines culture also as a "complex", which is made up of refers to the complex of belief, attitudes, cognitive ideas, values, etc.²⁷⁵ By adding the concept of "complex" as part of the definitions of culture, the current culture approach has the inherent tendency, explicitly or implicitly, to take culture as an autonomous and positive entity beyond its substantial contents, just as the concept of forest is independent from trees. With culture seen as some reified entity or power, this entity or power does not rely on each individual human mind for its existence but seems to exist beyond and independent from it. This is just like arguing that if a couple of trees are cut down the forest is still there.

The conclusions will be inevitably partial, rigid and biased. Supporters of marital rape law such as the legislators have taken the side of human rights values, thus arriving at the criminalization of marital rape. Opponents of marital rape law such as the judges, however, decide to take the side of traditional Chinese ethics, thus resulting in the inconsistency of Chinese marital rape law as well as all the disagreements and controversies surrounding the problem. In this sense, I may argue that the problems of Chinese marital rape problem have been caused, not by culture itself, but rather by the inappropriate understandings and applications of the concept of culture.

²⁷³ Cotterrell, "The Concept of Legal Culture", Comparing Legal Cultures, Dartmouth, p37; Friedman, "The Concept of Legal Culture: A Reply", Comparing Legal Cultures, Dartmouth, p34.

²⁷⁴ Liang Zhiping, *On Law: The past, present and future of Chinese law*, Guizhou Renmin Press, 1992, p1.

²⁷⁵ Cotterrell, "The Concept of Legal Culture", Comparing Legal Cultures, Dartmouth, p25.

3.1.4 Major features of the current culture approach

To fully illustrate this, I need to discuss in detail the characteristics and their inappropriateness of current culture approach in combination with the empirical data from the previous chapter.

1. Basic feature: Over-generalisation

The most basic feature of the culture approach is its over generality and insistence on homogeneity in its subject of studies. When referring to the culture of a society, it always tends to refer only to one, sometimes two, most dominating elements. For example, sometimes when talking about Chinese culture, the culture approach usually refers to nothing but the Confucianist traditions while, in contrast, when talking about the traditional European culture, often referring to nothing but the Christian traditions. With such a mode of thinking, the culture approach inevitably alienates culture from social reality, the source of culture's vitality. Though culture is still claimed to be what is typical of and dominating in the current society, it has in fact been over generalized and simplified, referring to the ideas of a person or a work thousands of years ago. Thus, traditional Chinese culture is in some degree condensed to Confucius and his book of *The Analects* while traditional western culture is condensed to *The Bible*.

The protagonists in marital rape law debate in China are trying to do the same thing. Those who oppose the criminalization of marital rape base their arguments only on the Confucian family ethics only while the supporters of a concept of marital rape on the women's rights notion. For either side, the Confucian ethics or the women's rights notions alone are sufficient to deny or establish their conclusions of marital rape law in the current Chinese society. However, this is not how cultural elements work in real life.

What influence people's attitude towards marital rape is not the Confucian family ethics alone, nor is the human rights notion alone, nor is the interaction between these two categories of cultural elements alone. The facts are much more complicated because it is not only the prevailing cultural elements that can exert influences on law. As Zweigert and Kötz say, "ideas of every kind have their effect, for it is not just feudalism, liberalism and socialism which produce different types of law."²⁷⁶ If we look at the everyday life, we can easily find that what guides people's behaviors are not just the "dominating" culture as we usually say, but the more specific composite forces of various cultural elements, dominant or not.

As shown in the surveys, an individual's outlook about whether the action of marital coercive sex is criminal or not is not decided only by either Confucian ethics or human rights notions. For example, a very important factor that influenced people's view is whether husbands cause physical harm to wives. When asked when the actions of marital coercive sex could be criminal (Question 6 in the Questionnaire), there was always more than 60% of people, in either Qingdao city, or Shenxian County and Pengzhuang village, or Yongxing and Dachang villages, who took the choice of "when the wife is physically hurt".

In contrast, according to Confucian family ethics, wives have the irrevocable duty of sex to their husbands. If wives refuse the husbands' sex demand, they are actually refusing to perform their legal and ethical duties. Accordingly, marital coercive sex as a sexual offence could never be criminal as rape is. However, the choice of "it never

²⁷⁶ Zweigert and Kötz, p36.

is” is taken by 4.6% in Qingdao, 27.6% in Shenxian County and Pengzhuang village and 12.2% in Yongxing and Dachang villages, which are remarkably lower.

Conversely, according to the conceptual reasoning of modern marital rape law, which conforms to the women’s rights notion, the core constitutive requirement of the crime of rape is the sexual intercourse without consent. Therefore, conceptually, marital coercive sex ought to be criminal as long as the wife expresses her lack of consent by saying “no”. However, such a choice was taken by 11.1% in Qingdao, 1.1% in Shenxian County and Pengzhuang village and 10.1% in Yongxing and Dachang villages, which are even lower.

If culture is, as by R. Cotterrell describes it, “the shared understanding and common outlook typical of a particular society or social group”, then “marital coercive sex is criminal when the wife is physically hurt” fits in with the definition much better than either a Confucian outlook or the ideas derived from the notion of women’s rights. As data shows, “marital coercive sex is criminal when the wife is physically hurt” is shared by relatively the largest majority of people and therefore can be seen as more common and typical in the current Chinese society. Confucius is somebody from thousands of years ago while human rights notions are transplanted from thousands of miles away, neither of which, as the survey indicates, could be as much shared, or as typical, or as common in the current Chinese society as the notion of “criminal when physically hurt”. Conceptually, if either the supporters or the opponents of marital rape law really want to use some “dominating” or “common” cultural factors as their arguments, it is “marital coercive sex is criminal when the wife is physically hurt” that should be used, instead of either Confucian ethics or the women’s rights notions.

Moreover, “criminal when physically hurt” is not the only one that fits in better with the definitions of the concept of culture than Confucian ethics or the women’s rights notion. Another choice in the questionnaire, “it is criminal when wife resists”, is also taken by more people than either the choice of “the wife says no” and the choice of “it never is”. In Yongxing and Dachang, “wife resists” choice was taken by 14.3% of interviewees, higher than 10.1% of “wife says no” and 12.2% of “it never is”. In Qingdao, the contrast is 15.7% of “wife resists” to 11.1% of “wife says no” and 4.6% of “it never is”. Only in Shenxian and Pengzhuang, 10.3% of interviewees took the “wife resists”, which is less than 27.6% of “it never is” but still higher than 1.1% of “wife says no”. So, even the notion that “marital coercive sex is criminal when wife resists” is better accepted by people and fits better with the concept of culture than the standard notions derived from either Confucian ethics or women’s rights values.

In fact, the key point here is that there are just too many cultural elements that need to be considered. If we consider only those perceived to be predominant high culture, we are quite likely to be fallaciously over-generalizing and over-simplifying. Bodley claims that culture is “collective”²⁷⁷ and Cotterrell says that culture is the “shared understandings”, “common outlook” “typical of a particular society or social group”.²⁷⁸ However, if over-generalized and over-simplified, either Bodley’s “collective” or Cotterrell’s “typical” and “common outlook” ensure not the comprehensiveness of current cultural approach to legal studies, but rather its inherent one-sidedness. “Law is the whole life”, said a great philosopher. But a copy of a religious scripture or a person from thousands of years ago is certainly not “the whole life”. A general and abstract social theory or notion like that of women’s rights cannot be truly lively cultural elements in real life either.

²⁷⁷ Bodley, *Cultural Anthropology: Tribes, States, and the Global System*, Mountain View California, 1994.

²⁷⁸ Cotterrell, “*The Concept of Legal Culture*”, *Comparing Legal Cultures*, Dartmouth, p25.

Therefore, if one is concerned only about Confucianism, or Buddhism and Taoism at most, when studying cultural influences on law in China, and only Christianity and the rationalist tradition when Europe, then one is inherently biased and one-sided. When a true human individual behaves, he is not always following the dominating religious teachings or rationalist law of nature. There are an infinite variety of factors acting in his mind. And this is the key point where the usual concept of culture and the lively cultural elements in the real life differ in terms of law and culture studies. Over-generality or homogeneousness ignores the liveliness and complexity of the different cultural elements in concrete social realities. Consequently, the whole society is generalized and simplified into some dogmas of one theory or notion, which alone work as the determining factor for the conclusions about marital rape law.

2. Ignorance of the reality

As a result of over generalisation, culture approach seems to have an intuitive tendency of focusing only on the so-called high cultures and typically ignoring the perhaps infinite individual ideas in reality.

By focusing on high cultures, the cultural elements in real life are often misinterpreted simply as a person, a book or a theory. But high cultures contained in books or elites' theoretical systems are not necessarily the live cultural elements in real life. People against the criminalization of marital rape establish their arguments on the ground of Confucian ethics. But the surveys have shown that the ideas of the great sage are not so well accepted as expected in the current Chinese society to direct people's attitude towards marital coercive sex. Supporters of the criminalization of marital rape establish their arguments on the ground of the human rights notion. Taking their notion *a priori*, they do not even care whether it has really been accepted in the minds of people in current Chinese society.²⁷⁹ Therefore, though they might both claim so, neither party establishes their cultural arguments on the truly existing live cultural elements in the social realities, but on a person or a theory that are far removed from real attitudes and opinions.

Being satisfied with ideas of famous figures and high theories as arguments, the culture approach is easy to ignore the reality. Before the promulgation of the new marriage law in 2001, serious considerations had been given to the possibility of an explicit special provision on the marital rape problem.²⁸⁰ The crucial problem standing in the way of the legislation was the concern about whether the criminalization of marital rape could be accepted or not by the people under such a long tradition of Confucian ethics.²⁸¹ The core of the problem, therefore, concerns the status of cultural elements in current social realities. However, even under such circumstances, when the current status of cultural elements is already the decisive factor for the legislation, no official institution has ever conducted any survey to find out what these factors really are.

²⁷⁹ Since they take human rights values as universal and absolute, supporters of marital rape law usually do not think they are also using a cultural argument. They might even claim their approach as "human rights approach" to distinguish themselves from culture approach. However, human rights values, same in nature as Confucian ethics, are just another group of ordinary cultural elements. Any cultural elements would be absolutized by their followers or believers. Similarly, believers of Confucian ethics can also have the same attitude towards human rights values just as believers of human rights values do to Confucian ethics. Detailed discussions about the nature of human rights values as ordinary cultural elements will be in the last chapter of the thesis.

²⁸⁰ <http://law.beelink.com.cn/zhti/zt01042802.htm>

²⁸¹ <http://law.beelink.com.cn/zhti/zt01042802.htm>

Finally a private research company, Horizon-China Research, conducted some surveys. However, the surveys conducted by Horizon-China Research are only limited to the three biggest cities in China, Beijing, Shanghai and Guangzhou, which could only represent the most westernized group of Chinese people but not those in the vast rural areas inland. Even these limited survey results have not drawn much attention from the legislators, who decided not to do anything in the 2001 Marriage Law, neither to make a special provision for the criminalization of marital rape as the supporters expected, nor to explicitly decriminalize it as the conservatives suggested.²⁸²

In terms of judicial practices, the Supreme Court has given comments, on both *the Wang Weiming Case* in Shanghai and *Bai Junfeng case* in Liaoning, explicitly prescribing the marital exemption of rape. The reason given is the traditional family ethics that are deeply rooted in the society.²⁸³ But they do not have surveys or any empirical data either to support their claims, and it is, therefore, quite doubtful how they can be sure such ethics are still deeply rooted in the current society. The common people's ideas, which can be easily found out by means of surveys, are the cultural elements pursued. But with the general culture approach, they would rather derive their conclusions from the dogmas of their believed Confucian ethics than to directly and empirically find them out with surveys.

Empirical evidences are more important for the opponents of marital rape law than for the supporters. What the supporters of the criminalization of marital rape want to do is to change the traditional Chinese cultural elements of Confucian ethics and to replace them with their own notion of the women's rights as individuals equal to men. Therefore, it would be understandable if supporters deliberately ignore the traditional cultural elements. But the opponents of the criminalization of marital rape cannot do that because they are using the traditional cultural elements as their fundamental arguments, their basic premises. Therefore the opponents must ascertain that the traditional cultural elements are still there for their arguments to gain validity. Surprisingly they have done even less empirical research than the supporters. Resulted from the basic characteristic of over generality, such ignorance of the reality is fatal for the arguments of the opponents of the criminalization of marital rape.

3. Presupposition failure:

Both supporters and the opponents of the criminalization of marital rape claim that their arguments are based on actual cultural elements in society. While supporters of the criminalization can at least rely on only the surveys in the three biggest cities of Beijing, Shanghai and Guangzhou, what supports opponents' claim is only their arduous belief that traditional Confucian ethics are still ruling over the mind of most people in China.

Surveys in Beijing, Shanghai and Guangzhou do show an encouraging picture for the supporters of the criminalization of marital rape. Shanghai has the highest rate of 77.5% people recognizing marital rape, with 65.3% in Beijing and 66.4% in Guangzhou. The survey results should have shown that the necessary cultural elements for the criminalization of marital rape are indeed in the dominating position in the three cities. And the traditional family ethics as opposing power no longer have much weight.

²⁸² <http://law.beelink.com.cn/zhti/zt01042802.htm>

²⁸³ *Reference to Criminal Trial*, vol. 3 in 1999 and vol. 2 in 2000.

But the population of the three cities together is about 35.84 million, counting for only 3% of the total Chinese population.²⁸⁴ So, cultural elements dominating in the three cities are not necessarily dominating in the nation as a whole. Indeed, my surveys in the inland and rural areas have shown a quite different picture.

Among the choices for Question 5, which concerns the nature of the action of marital coercive sex, only 6.4% in Yongxing and Dachang villages think it is rape while the percentage is 6.9% in Pengzhuang village and Shenxian County. Qingdao as a small coastal city has only 13.9% people recognizing marital coercive sex as rape. This question is asking the interviewees to make their own subjective value judgments about the problem of marital coercive sex. The values leading to the answers given by the interviewees are the respective cultural elements of family ethics. So, answers to this question can best reflect the status of the existing ethical ideas in people's minds. Here, the low percentages of people who classify marital coercive sex as rape show that, in those areas, the cultural elements supporting the criminalization of marital rape are *not* in the dominating position.

In Question 8, where the court has already delivered the guilty verdict of rape, the interviewees are asked to make a rather passive judgment of the decision of the authority. Higher percentages appear to accept the verdict than those who voluntarily take the marital coercive sex as rape in Question 5. In Qingdao city, 70.1% think the verdict is reasonable, which is quite close to the percentages of who recognize marital rape in Beijing, Shanghai and Guangzhou. 31.6% in Yongxing and Dachang villages and 26.8% in Pengzhuang village and Shenxian county also judge the decision as "reasonable". The higher percentages here in Question 8 than those in Question 5 may show that people would like to accept the legal authority and change their own ideas. But the rural percentages of 31.6% and 26.8% are still minorities, which again conform that cultural elements supporting the criminalization of marital rape are *not* dominating in rural areas.

Given the size and population of inland rural areas, cultural elements that are not dominating in the inland and rural areas are surely not dominating in the Chinese society as a whole, even though they may be dominating in some cities like Beijing, Shanghai or Guangzhou.

On the other hand, the opponents of the criminalization of marital rape believe that their cultural elements of Confucian family ethics are still in a dominating position, especially in the inland and rural areas. But the survey results do not seem to support the claim.

In Question 5, 48.4% in Yongxing and Dachang choose "it is not illegal though it is not good", and the percentage is 57.5% in Pengzhuang and Shenxian. The percentages are indeed much higher than those of "it is rape without consent" (6.4% and 6.9% respectively). But these mean that only about half of the people in these rural communities still fairly agree with the Confucianist viewpoint on marital coercive sex. Some of the remainders are already holding the modern liberal point of view to support the criminalization of marital rape, and others are at least undecided and could possibly be converted to either the traditional Confucianist view or the modern liberal view by their peers. Under such circumstances, it is a bit unwarranted to say that traditional ethics, which are accepted by only half of the people, are still dominating the rural society in terms of the marital rape problem.

In Question 8, when the court delivers the guilty verdict of rape, 43.9% in Yongxing and Dachang villages think the verdict is unreasonable while the percentage

²⁸⁴ See the *Bulletin of the Fifth National Census (2000)*, <http://www.stats.gov.cn/tjgb/rkpcgb/>.

in Shenxian and Pengzhuang is 50.8%. These are still the high percentages compared with other choices in the same question. But if we compare the two percentages with the corresponding ones in Question 5 of the “it is not illegal though it is not good” choice, 48.4% and 57.5% respectively, we can see that under the pressure of modern legal authority, Confucian loyalists have reduced in number.

Also if we sum up the percentage of the first choice and the third choice in Question 8, it makes up to 56.2% in Yongxing and Dachang, and 49.2% in Shenxian and Pengzhuang. So, under the pressure of legal authorities, in Shenxian and Pengzhuang, people with firm traditional attitude are about the same in number as the people who hold or could possibly hold the opposite attitude towards marital rape. In Yongxing and Dachang, as a result of the court’s guilty verdict, people with the liberal attitude have even surpassed the conservative people in number.

With the results, it would not be right even in the rural areas for people to claim that the traditional Confucian family ethics are still “deeply rooted in”²⁸⁵ or “dominating”²⁸⁶ the current Chinese society in terms of marital rape. And in the cities, as data have shown, traditional Confucian ethics are even farther from dominating. So, in current Chinese society as a whole, traditional Confucian ethics are no longer exerting a dominant influence at least as far as marital rape is concerned.

Confucian family ethics and human rights notion are used as the fundamental cultural arguments for the discussion the criminalization of marital rape, by opponents or supporters. But now we know neither of them is enjoying the dominating position in the current Chinese society. If we again refer to Cotterrell’s definition of culture, i.e. of “shared understandings”, of a “common outlook” or as being “typical of a particular society or social group”²⁸⁷, we find neither of the above fit in with the definition. This is to say, in terms of marital rape, people’s understanding and outlook are currently in a dynamic process of changing, and there is nothing typical and general yet that can be called “culture” so defined.

However, the culture approach in legal studies needs the concept of culture as its starting point or logical premise. Since the current transformation of Chinese society has caused the fragmentation of culture as a general concept in terms of the marital rape problem, the very foundation of the law and culture approach becomes tenuous. As a result, for the current Chinese marital rape law problem, the culture approach is violating one of its own presuppositions for analysis and therefore has an inherent logical inability --- the lack of valid premise.

4. Inability to interpret the mechanism of how culture exerts influences on law

Apart from the problem of the missing presupposition, the culture approach also has drawbacks in its methodology that results in its inability to explain *how* culture exerts its influences on law.

The culture approach, as applied in the discussions about current Chinese marital rape law, tends to arrive at its legal conclusions directly from cultural arguments. The methodology they adopt seems to be a sort of deductive argument. From wives’ duty to their husbands in the Confucian ethics, the opponents derive their legal conclusions against the criminalization of marital rape. From women’s independent rights, the supporters derive their necessary legal conclusions for the criminalization of marital

²⁸⁵ *Reference to Criminal Trial*, vol. 2, 2000, p28.

²⁸⁶ Fu Liqing, “*Marital Rape Should Wait---Between To Be and Ought To Be*”, *Cases and Judicial Interpretations of Criminal Law*, vol. 4, p416. Or the website: chinalawinfo.com/xin/disxwpl.asp?code=129&mark=1504 (2002/2/11).

²⁸⁷ Cotterrell, “*The Concept of Legal Culture*”, *Comparing Legal Cultures*, Dartmouth, p25.

rape. In the reasoning processes, while cultural elements work as the premises, legal conclusions seem to come intrinsically from it. What lies in between to link up cultural elements and legal conclusions is obscure or totally omitted.

Such a type of reasoning process can easily obscure or even eliminate the boundaries between law and the non-legal realms. If the law is just the direct and intrinsic outcome of the corresponding ethics, people's outlooks or other cultural elements, then there must be various laws for the same problem of life in one society, which are different from, contradictory to or even opposing each other, because people often have different understandings or outlooks about the same problem, which could be taken as different cultural elements. Thus, this direct and intrinsic reasoning between culture and law is obviously fallacious.

The problem here is the insufficient understanding of the mediating links between culture and law, which in fact is the inability to interpret the concrete mechanism of how cultural elements exert their influences on law. Laws are positive social norms, or, in Zweigert and Kötz's words, the solutions to problems of life.²⁸⁸ They are not just another form of ethical teachings, religious beliefs or theoretical illustrations. So, we cannot simply arrive from one specific ethical notion to the conclusions about the specific legislation on a specific problem of life. Only after we have fully understood the concrete and detailed mechanism or process of how cultural elements exert their influences on law, can we realize how the law distinguishes itself from ethical notions or other cultural elements while at the same time is closely connected with them.

However, with its general and crude nature, the current culture approach seems too coarse to analyze in detail the delicate influence-exerting mechanism between culture and law. Problems caused by such an inability are obvious in current Chinese marital rape law.

The supporters of the criminalization of marital rape base their arguments on the transmitted western cultural elements: the notion of women's innate rights of sexual self-determination. They are happy with the current Chinese legislation on rape, which, read abstractly and out of context, has the capacity to criminalize marital rape. But, with no further knowledge of the influence-exerting mechanism between culture and law, the supporters of criminalization of marital rape tend to ignore the current Chinese social realities, and therefore fail to understand the problems of effectively implementing this legislation in practice and giving it effect.

Thus the legislation criminalizing marital rape become the reflection of only the dogmas of some foreign notions not the reflection of the realities of current Chinese society. As a result we see severe inconsistency between the legislation and the judicial practice: while the current legislation has already criminalized marital rape, the principle of marital exemption of rape is still firmly adhered to in judicial practice. This inconsistency, as I will show later, is the evidence that women's rights notions has not exert its influences through the proper channels, and is therefore also the evidence of the importance of the understanding of the influence-exerting mechanism between culture and law.²⁸⁹

5. Discrepancies in conclusions about the social environment

With all the fallacies in basic premises and reasoning methodologies, naturally, the culture approach reaches wrong conclusions about marital rape.

The first fallacious conclusion is about the status of cultural elements concerning marital rape in the current Chinese social environment. This fallacy is more evident in

²⁸⁸ Zweigert and Kötz, p34.

²⁸⁹ See Chapter 3.2.2 for detailed discussions about the influence-exerting mechanism between culture and law.

the opposing side of the criminalization of marital rape than in the supporting side. The supporters, as previously said, intend to change the traditional cultural elements that they know exist in current Chinese society and may therefore not care that much as the opponents do about conclusions about these cultural elements.

The opponents, however, establish themselves basically on the claim that traditional Confucian family ethics are still dominating present Chinese society. Such a conclusion about the current cultural elements in social environment is significant to any further argument of the opponents of the criminalization of marital rape.

But this conclusion is drawn not from the empirical research into the social environment but from the deduction from premise of traditional ethics *per se*. Opponents argue that Confucian ethics is native Chinese and has lasted for so long in Chinese history.²⁹⁰ They admit that some changes have taken place under the strong influences of western cultures but they assume traditional family ethics should still dominate, especially in the countryside.²⁹¹

The surveys in the rural areas have empirically demonstrated that, though not as liberal as cities, rural minds are no longer so dominated by Confucian family ethics as the opponents expect in terms of the marital rape problem. All the data in last chapter and the precious analyses in this chapter have offered considerable evidences of this.²⁹² And the marital rape law actually has much better social environment to operate in than claimed by the opponents of the criminalization of marital rape.

6. Unsatisfactory proposals

The second problematic conclusion by the culture approach about Chinese marital rape is its implication for the legislation or judicial practice.

Idealistic supporters of the criminalization of marital rape base their argument only on women's rights notions. These are what legislators are, who have brought the complete conceptual criminalization of marital rape to the legislation. But, the empirical data has shown that, such legislation is simply not followed by judges in judicial practices and the strict concept of marital rape is not accepted either by the majority of people in current Chinese society. So the proposal of complete criminalization of marital rape has turned out to be a failure.

In law people's debates about marital rape, there are only supporters of partial criminalization of marital rape. These people base their support on the human rights notion, claiming marital rape ought to be criminalized. But the judgment of realistic cultural environment makes them retreat from their original position. Consequently they suggest that marital rape be criminalized only under circumstances where abnormal marital status or violence is present. This proposal is what is followed in some of the cases today. However, the proposal has inherent contradiction in it as it is an unwilling compromise between *to be* and *ought to be*. So the proposal is not satisfactory even to the people who make it.

The opponents of the criminalization of marital rape base themselves on the assumption that current Chinese society is dominated with traditional Confucian ethics, to which marital rape is an unacceptable concept. But the previous empirical data have shown that the concept of marital rape is not completely unacceptable now, even in the conservative rural areas. And given that most marital rape cases occur during separating or divorcing period, the concept already sounds sensible to many

²⁹⁰ See: Liu Xianquan, "It's Improper to Criminalize Marital Rape"; Shi Meitang, "Husbands' Raping Their Wives Are Not Criminal", Law Science (FA XUE), vol. 3, 2000.

²⁹¹ Ibid.

²⁹² Answers to Question 3 and 6 can be good examples.

people, even in the rural areas. Therefore, the cultural arguments against the concept of marital rape are untenable. Beside, the rejection of marital rape is against the legislation, causing the inconsistency within the legal system. For the reasons above, the rejection of marital rape is not appropriate either.

3.2 Constructions of the Memetic Approach

After the problems of the culture approach, this part is the construction of the memetic approach, a new approach with which I will try to provide better solutions to the problem of Chinese marital rape law.

3.2.1 Subindividual approach and memetic theory

1 Subindividual approach & the discipline of memetics

As we have seen, the underlying reason for the failures of current culture approach is the generality and vagueness of the fundamental concept of culture. The reason that the concept is so general and vague is because culture, as normally used, is a supra-individual entity, which can contain various different things.

Such a view of culture is shared by many theories that either assert or assume that individuals are socially and culturally constructed. These theories have tended to submerge the individual into the larger forces of society and culture and take a relatively unitary view of the cultural elements in a society.²⁹³ Thus the problem of conceptual generality and vagueness easily arises.

To overcome the drawbacks that result from a supra-individual methodology, the remedy is, naturally, its antithesis, methodological individualism, the view that all social phenomena can be explained in terms of individuals: their actions and their mental states. Opposing theories always have symmetric strengths and weaknesses, each explaining best what the other downplays or disregards. Echoing the problems of social construction theories, methodological individualism may also be incomplete, for the individual is not the only unit of social explanation. However, for the sake of overcoming the generality and vagueness of the concept of culture, individualism is required.

The culture approach is too general because it is based on the general concept of culture. If human individuals were substituted for culture as the foundation of the methodology, it would be more individualistic than the general culture approach. Actually, the methodology I will propose is even more individualistic than this. Instead of human individuals, I take as the methodological foundation the most basic cultural elements that every human individual bears in his mind, which is therefore sub-individual and I call as sub-individualism. By sub-individualism, I want to make an antithesis of supra-individualism. Supra-individualist concept like culture is superior to human individuals. The sub-individualist conception of culture, on the other hand, referring to the most basic units of cultural elements, is subter-human individual. It is with this sub-individualistic methodology that I hope to achieve the goals of both supra-individualistic and the ordinary individual methodologies. That is, I hope to account for not only the uniqueness of each individual being but also how the social and cultural forces shape us and produce our individuality.

As an sub-individualist, I will do without supra-individual entities. Being supra-individualistic, the general culture approach has been looking in the wrong place.

²⁹³ J. M. Balkin, *Culture Software, A theory of Ideology*, Yale University Press, New Haven & London, 1998, px.

Instead of looking above or beyond individuals, it should look deeper inside them and look directly at the most basic cultural elements themselves, or the sub-individual entities: the units of cultural transmission that help form individuals as well as create the overall culture in the whole society. These sub-individual entities, as the most basic cultural units, are what produce the effects that social theorists in the past saw from outside the individuals explaining as cultural phenomena.²⁹⁴

The sub-individual approach provides a new perspective to view human individuals and society, basic cultural elements and culture in general. Since the sub-individual entities forming both social culture and individuals, conflict between individualism and social constructionism no longer exists but is merged into one and the same question: how do these basic sub-individual elements form both the individuals and the overall culture in the society.

One typical representative of this sub-individualistic approach is what is called the theory of memetics. Memetics is the name of a relatively modern field of research that deals with the analysis of cultural transfer and evolution by studying the basic cultural elements viewed as "living" organisms, capable of reproduction and evolution in an "ideosphere" (similar to the *biosphere*), the collective of human minds. Thus the study of cultural phenomena and the evolution of culture would turn out to be the study of the replication and evolution of these bacteria-like "living" organisms.

At least since the early seventies, or perhaps late sixties, some authors have tried to adopt the Darwinian theory of evolution by selection to understand the continuous change in cultural behaviours.²⁹⁵ However, it was a book by Richard Dawkins, *The Selfish Gene*, first published in 1976,²⁹⁶ that greatly popularized the memetic approach. In this book, Dawkins coined the term 'meme'(rhymes with cream), this is a shortening of mimeme (from Greek mimēma), as analogous to the biological unit of inheritance, the gene or the genetic replicator.²⁹⁷ While gene refers to the most basic biological units of information, meme refers to the basic cultural units. The rather simple distinction between genetic replicators as 'genes' on the one hand and all non-genetic replicators as 'memes' on the other has been firmly imprinted in the evolutionary thinking about cultural information. Since then the coining of the term of meme has greatly promoted the development of the new discipline, and it is also how the new discipline gets its name.

Memetics has since influenced a wide variety of fields of study. Richard Dawkins works with it in the field of evolutionary biology,²⁹⁸ Daniel Dennet applies it to his research on the philosophy of mind,²⁹⁹ Hull has tried memetic theory in evolutionary epistemology and the development of science;³⁰⁰ Rogan Jacobson thinks it may work

²⁹⁴ Ibid.

²⁹⁵ Among the writings resulted from the early explorations, we might find: Campbell DT, "Variation and Selective Retention in Socio-cultural Evolution", Social Change in Developing Areas, A Reinterpretation of Evolutionary Theory, (Barringer HR, Blanksten GI and Mack RW (eds)) Schenkman Publishing Co., 1965. Cavalli-Sforza L. and Feldman M., "Cultural versus Biological Inheritance: Phenotypic Transmission from Parents to Children", Human Genetics, 1973, vol.25, p618-637. Campbell DT., "Evolutionary Epistemology", The Library of Living Philosophers, Vol. XIV: The Philosophy of Karl Popper (Schlipp PA (ed)), LaSalle: Open Court, 1974. Boyd R. and Richerson PJ., *Culture and the Evolutionary Process*, University of Chicago Press. 1985. etc.

²⁹⁶ Dawkins R., *The Selfish Gene*. Oxford University Press, 1976

²⁹⁷ Ibid. p192.

²⁹⁸ See: Dawkins R., "Organisms, Groups and Memes: Replicators or Vehicles?", The Extended Phenotype, Oxford University Press, 1982, p97-117; Dawkins R. "Viruses of the Mind", Dennett and His Critics, Blackwell Publishers, 1993, p13-27.

²⁹⁹ See: Dennett D. "Memes and the exploitation of imagination", J Aesthetics Art Criticism 48: 127-135, 1990; Dennett D., "Darwins Dangerous Idea", The Sciences 35: 34-40, 1996.; Dennett D., *Consciousness Explained*, Penguin Books, 1991.

³⁰⁰ Hull DL., "The Naked Meme", Learning Development and Culture, Essays in Evolutionary Epistemology (Plotkin HC (ed)), John Wiley and Sons, 1982.; *Science as a Process: An Evolutionary Account of the Social and*

in historical studies,³⁰¹ Coombs and his colleagues have found the meme concept useful even in company strategies.³⁰² Other fields like artificial intelligence, psychology, sociology, etc. have also found the application of memetics.

With its wide applications, the term 'meme' has been used for very different ideas in different contexts of various disciplines. For example, Dennett sees the human mind as being built from memes comparable to the programming of a computer.³⁰³ Hull defines the meme as replicator, and adds interaction to account for evolution by natural or artificial selection, describing selection processes in science and biology with exactly similar definitions.³⁰⁴ Most popularly, memes are described as 'viruses of the mind', just like those biological or computer virus varieties, who would kill or damage others for the sake of their own survival.³⁰⁵

Meme, in this thesis, literally, is the most basic unit of cultural information. This understanding of meme serves the present purpose of the thesis best, which is to apply the theory of memetics to the study of the cultural elements in marital rape law. As far as I am aware, memetics has not yet been used extensively in the study of law. J. M. Balkin has made his efforts in his book of *Cultural Software* to apply memetic theory in legal studies.³⁰⁶ In his book, Balkin tries to constitute his theory of ideology by combining memetic theory and legal theories. This thesis tries to, with the help of memetics, to solve the problems of culture-impacted marital rape law by giving better interpretations of how culture exerts effects on law. But before the attempt to apply memetic theory to Chinese marital rape law, a few more comments about the theory of memetics are necessary.

2 Introduction of the basic theory of memetics

The new discipline of memetics is derived from the science of biology. In biology, the principle of evolution by selection from the natural selection theory developed by Darwin is well known and widely accepted to explain evolution of biological organisms.³⁰⁷ Dennett calls this natural selection principle a universal acid: "it is such a powerful concept that it bites through everything".³⁰⁸ This implies the possibility for the principle to be applied in non-biological fields.

According to Balkin, this evolution by natural selection requires the following five conditions: 1) entities that replicate; 2) a source or mechanism of variation that continuously provides differences among entities; 3) a means by which variations can be passed on to future replicants; 4) an environment in which the entities replicate; 5) different degrees of survival for different entities within the environment. Once these

Conceptual Development of Science, University of Chicago Press, 1988.

³⁰¹ Jacobson, *Bridging the Gap: Memetics as a Methodological Tool to Close the Ranks between Social and Traditional History*, <http://pespmc1.vub.ac.be/Conf/Memepap/Jacobson.html>

³⁰² Coombs, R., Saviotti P., & Walsh V., eds. *Technological Change and Company Strategies: Economic and Sociological Perspectives*. Academic Press, 1992.

³⁰³ Dennett D. "Memes and the exploitation of imagination", *J Aesthetics Art Criticism* 48: 127-135, 1990; Dennett D., "Darwins Dangerous Idea", *The Sciences* 35: 34-40, 1996.; Dennett D., *Consciousness Explained*, Penguin Books, 1991

³⁰⁴ Hull DL., "The Naked Meme", *Learning Development and Culture, Essays in Evolutionary Epistemology* (Plotkin HC (ed)), John Wiley and Sons, 1982.; "Interactors Versus Vehicles", *The Role of Behavior in Evolution* (Plotkin HC (ed)), MIT Press, 1988; *Science as a Process: An Evolutionary Account of the Social and Conceptual Development of Science*, University of Chicago Press, 1988.

³⁰⁵ Dawkins R., *The Selfish Gene*, Oxford University Press, 1976, 1982.; Dawkins R., *Viruses of the Mind, Dennett and His Critics*, Blackwell Publishers, 1993, p13-27.

³⁰⁶ Balkin, "Preface", *Cultural Software: A Theory of Ideology*.

³⁰⁷ Darwin C. R., *The Origin of Species. By means of natural selection*. John Murray, 1859.

³⁰⁸ Dennett D., "Darwins Dangerous Idea", *The Sciences* 35: 34-40, 1996.

five conditions are met, there will be a process of natural selection, which will produce highly complex and differentiated entities over time.³⁰⁹ In this sense, Darwin described only a special case of selection when he was dealing with biological evolution. Nothing in this formulation requires the replicating entities to be organic in nature.³¹⁰

Evolutionary theories can therefore be applied to a wide variety of disciplines. In computer sciences, genetic programming and genetic algorithms are descendants of this evolutionary view.³¹¹ Evolutionary theory also is employed in the field of economy, combined with the development of technology³¹²; or with the evolution of institutions³¹³. Campbell combines evolutionary theory with human learning theories, applied to individuals, groups and society.³¹⁴ Besides, we can find the theory's philosophical value in the works of Popper³¹⁵ and Kuhn³¹⁶. With the great potential of evolutionary thought in all fields of human sciences, it would not be surprising if the Darwinian mechanism also works in culture sphere.

With the memetic concepts well used to describe the different kind of evolutionary processes of culture,³¹⁷ the evolutionary approach, although originating in biology, no longer confined only to plants and animals.³¹⁸ The founders of the memetics set up the theory not as an analogous fiction or mere metaphor but as a serious science.

Dawkins defines a meme as "a unit of culture transmission, or a unit of imitation" that can replicate itself.³¹⁹ There are as many different kinds of memes as there are things that can be transmitted culturally. Dawkins gives examples of memes like "tunes, ideas, catch-phrases, clothes fashions, ways of making pots or of building arches".³²⁰ We can have as many more examples as we like, such as how to sing a particular song; how to make a particular kind of food; how to order a meal in a restaurant; a political slogan; the belief in God, etc., etc. Memes can be skills and abilities and they can also be beliefs about the world and the ethics of family. Actually memes "encompass all the forms of cultural know-how that can be passed to others through the various forms of imitation and communication".³²¹

It might be because memetics as a new discipline is still in its infancy that the concept of the meme is currently experiencing a controversial process of debate. Now a meme can be found variously described as: "a unit of information residing in a

³⁰⁹ Balkin, p42.

³¹⁰ As Balkin says: "the first self-replicating entities on this planet may even have been bits of clay, whose slower replication was swamped by the earliest forms of organic life". Balkin p42.

³¹¹ Refer to Holland JH, *Adaptation in Natural and Artificial Systems*, University Michigan Press, 1975. Also: Kauffman SA, *The Origins of Order, Self-organization and Selection in Evolution*, Oxford University Press, 1993.

³¹² Nelson RR., *Understanding Technical Change as an Evolutionary Process*, North-Holland, 1987. Nelson RR and Winter SG Jr., *An Evolutionary Theory of Economic Change*, Belknap Press of Harvard University Press, 1982.

³¹³ Hodgson G., *Economics and Evolution. Bringing life back into economics*, Polity Press, 1993. North DC., *Institutions, Institutional Change and Economic Performance*, Cambridge University Press, 1990.

³¹⁴ Campbell DT, "Variation and Selective Retention in Socio-cultural Evolution", *Social Change in Developing Areas, A Reinterpretation of Evolutionary Theory*, (Barringer HR, Blanksten GI and Mack RW (eds)) Schenkman Publishing Co., 1965; Campbell DT, "Evolutionary Epistemology", *The Library of Living Philosophers*, Vol. XIV: *The Philosophy of Karl Popper* (Schlipp PA (ed)), LaSalle: Open Court, 1974.

³¹⁵ Popper KR. *Objective Knowledge: An Evolutionary Approach*, Clarendon Press, 1979.

³¹⁶ Kuhn TS., *The Structure of Scientific Revolutions*, University of Chicago Press, 1970.

³¹⁷ Hans Cees Speel, *Memetics, the Way an Overall Conceptual Framework Can Promote Communication Between Disciplines*, <http://home.planet.nl/~speel235/hcmem.htm>.

³¹⁸ Dawkins, *The Selfish Gene*, p189.

³¹⁹ Dawkins R, *The Selfish Gene*. Oxford University Press, 1976, 1982; "Organisms, Groups and Memes: Replicators or Vehicles?", *The Extended Phenotype*, Oxford University Press, 1982, p97-117.

³²⁰ Dawkins, *The Selfish Gene*, p192.

³²¹ Balkin, p43.

brain”(Dawkins),³²² “a unit of imitation”(Dawkins),³²³ “roughly equivalent to ideas or representations”(Plotkin)³²⁴, “culturally transmitted instructions”(Dennett),³²⁵ etc. However, despite all the differences, these definitions share the following commonalities:

1. The meme is the most basic cultural unit.
2. A piece of information is essential to the cultural unit of meme.
3. The piece of information exists one way or the other as a mental object in the mind of individual humans.

With the three features, the meme as a basic unit of information in an individual’s mind is obviously a sub-individual entity and any individual can have more than one memes. So the memetic approach to culture study, different from the general culture approach, is based on a sub-individual instead of supra-individual concept.

In a nutshell, the understanding of a meme in cultural studies is of similar importance to the understanding of DNA and RNA in molecular biology. Memes to cultural constructs are as genes to biological organisms. Thus, memes can be taken as the most basic culture units or culture-genes. And the study of culture can become the study of these basic cultural units of memes while the study of culture transmission and evolution can become the study of how memes spread and replicate themselves among people and how memes change in the process of their spread and reproduction. The concept of meme is of crucial importance to culture study.

How will this sub-individualistic meme eventually form the human individuals and, further down the line, form the general cultures of a society? Like biological genes, it is through the replication. The explanatory strength of genes lies in their function as replicators.³²⁶ However, genetic evolution is only one of many possible kinds of evolution. Once conditions are met for a new kind of replicator - either genetic or memetic or whatever - to make copies of itself, the new replicator will start a new kind of evolution. Once this new evolution begins, it will not necessarily be subservient to the old. “Once self-copying memes had arisen, their own, much faster, kind of evolution took off”.³²⁷

How do memes replicate themselves? The question leads us to the concept of imitation. As Dawkins puts it: “just as genes propagate themselves in the gene pool by leaping from body to body via sperms or eggs, so memes propagate themselves in the meme pool by leaping from brain to brain via a process which, in the broad sense, can be called imitation”.³²⁸ Imitation, as defined by the psychologist, Thorndike, is “learning to do an act from seeing it done”.³²⁹ Susan Blackmore, elaborating on this idea, thinks that “the skill of generalized imitation means that humans can produce behaviors of almost unlimited kinds and pass them on to each other by a kind of copying”.³³⁰ Thus, once we define memes as something transmitted by imitation,

³²² Dawkins, *The Extended Phenotype*. Oxford University Press, 1982.

³²³ Dawkins, *The Blind Watchmaker*, London: Penguin, 1988.

³²⁴ Plotkin, *Darwin Machines and the Nature of Knowledge*, London: Penguin, 1994.

³²⁵ Dennett, *Consciousness Explained*. New York: Little, Brown & Co, 1991.

³²⁶ Dawkins, *The Selfish Gene*, p193.

³²⁷ Ibid.

³²⁸ Ibid.

³²⁹ Thorndike, E. L. “*Animal intelligence: An Experimental Study of the Associative Processes in Animals*”, Psychological Review Monographs, 2, No. 8. 1898.

³³⁰ Susan Blackmore, “*Imitation and the definition of a meme*”, Journal of Memetics - Evolutionary Models of Information Transmission, 2, 1998. http://jom-emit.cfpm.org/1998/vol2/balckmore_s.html

whatever is passed on by this copying process is a meme. Based on this definition, memes meet the three following conditions to be replicators:

1. Heredity (the form and details of the memes are copied),
2. Variation (they are copied with errors, embellishments or other variations),
3. Selection (only some memes are successfully copied).³³¹

Through the memes' replication by imitation, culture comes into existence and evolves.

With replication occurring, memes start a true evolution process. And memes, like genes, become units of inheritance, the cultural inheritance. However, while we inherit our genes from our parents, we can inherit our memes from anyone we learn from, imitate, or communicate with. We pass our genes on to our children only, but we can pass on our memes to anyone who learns from us, imitates us, or communicates with us.³³²

For the sake of successful replication, memes sometimes need to co-exist to form meme-complexes in the same way as co-adapted gene-complexes. Meme-complexes are important for several reasons. First, in some cases, a meme need to depend on the existence of some other memes to survive the evolution process. For example, the meme of marital rape needs at least two other meme to exist: "rape" and "marriage".³³³ Secondly, one meme greatly promotes the chance of survival of other memes in the complex, a good example of which are the religious memes. A member of the religious meme complex is called faith, which means, according to Dawkins, "blind trust, in the absence of evidence, even in the teeth of evidence".³³⁴ And it is this meme for blind faith secures the perpetuation of god meme by the simple unconscious expedient of discouraging rational inquiry.³³⁵

So the existence of meme-complex is for the benefits of memes themselves. Anything that memes do are for their own benefit, and this is why Dawkins calls memes "selfish" and "ruthless".³³⁶ Memetics holds that, "in the domain of memes, the ultimate beneficiary, the beneficiary in terms of which the final cost-benefit calculations must apply is: the meme itself, not its carriers".³³⁷ Indeed, the carriers, instead of being benefited, are often harmed by the memes they carry just as the carriers of virus are harmed by the diseases caused by the virus. Religious memes for example have turned many people to martyrs. To a degree we can say that the martyrs are killed by the memes they carry, but their death is beneficial to the memes of religion.³³⁸

However, we do not always have to be so negative about memes and meme-complexes. The collection of memes and meme-complexes, according to memetists, will construct the mechanisms or tools of human understanding. As Dennett says, "Human consciousness is itself a huge complex of memes."³³⁹ And some memetists vividly liken the tools of understanding to computer software, which processes data. J. M. Balkin, for example, says that our tools of understanding are constructed from and

³³¹ Ibid.

³³² Balkin, p45.

³³³ See also an example given by Balkin: "in order to learn a theorem in physics, a person must already be able to speak a language, must already have some knowledge of mathematics". Balkin, p44-45.

³³⁴ Dawkins, *The Selfish Gene*, p198.

³³⁵ Ibid.

³³⁶ Dawkins, *The Selfish Gene*, p196.

³³⁷ Dennett, http://www.edge.org/3rd_culture/dennett/dennett_p3.html.

³³⁸ Dawkins, *The Selfish Gene*, p198.

³³⁹ Dennett, *Consciousness Explained*, p210.

with skills and abilities that memes collectively provide while memes are the building blocks of the cultural software that forms our apparatus of understanding.³⁴⁰ These tools or software, according to Balkin, are what we use to understand the world and articulate our values: “They are tools used to make other tools. This has always seemed to me the deeper meaning of the Talmudic story; for when God created human beings on the sixth day of creation, one of His final acts was to bequeath to them a toolmaking tool, which is human culture”.³⁴¹ This means that these memes are tools to spread memes as well as produce new memes.

With these tools or software, both the unique individuals and their shared culture are constituted. As Balkin puts it, a person is a human being inhabited by memes, a complicated symbiosis of organism and cultural skills: “The different beliefs and worldviews that human beings possess are the product of the evolution of cultural information that is instantiated in human beings and helps to make them the unique individuals they are”.³⁴²

On the other hand, cultures are populations of individuals with relatively similar kinds of memes. Any person is constituted by a particular kind of memes that exist at his particular point in time. When these people gather together, the memes they have will show a certain kind of general similarities, or the people will appear to have the shared ways of understanding.³⁴³ This is how unique individuals form the common culture in a society.

3 Conceptual clarification: the materialized v. the unmaterialized memes

Evolutionary biologists distinguish between the genetic information coded in genes (the genotype) and the physical or behavioral effects of this coding on an organism in its environment (the phenotype). Corresponding distinctions are also made in memetics between the information coded in memes (the memotype) and the cognitive and behavioral effects that the meme produces in a person (the memetic phenotype).³⁴⁴ As human cognitive apparatus cannot directly cognize abstract memotype and its power is limited only to the phenotype effects, the memetic phenotype is therefore of essential importance to the spread of memes from one mind to another.

But such a distinction was not made at the very beginning of the discipline of memetics. When Dawkins created the concept of memes on the analogy of genes, he recognised the limitations of his construction. For example, with the analogy, it is difficult to recognize anything like a memetic allele or memetic chromosomes. For this theoretical inadequacy, Dawkins suggested that the meme is still “drifting clumsily about in its primeval soup”³⁴⁵ like early replicating molecules, and might have a very different mechanism for competition such as memory space in the brain. Thus Dawkins avoided the need for the definition of a vehicle of culture or memetic phenotype.

However, more memetists feel the need to distinguish the genotype/phenotype in memes as biologists do to genes. Otherwise, with Dawkins’ lack of clarity, much confusion would be generated, an example of which might be Dennett’s famous

³⁴⁰ Balkin, p6.

³⁴¹ Balkin, p6

³⁴² Balkin, pix.

³⁴³ Balkin, pix.

³⁴⁴ Balkin, p45.

³⁴⁵ Dawkins, *The Selfish Gene*, 1989, p206.

maxim: "A scholar is just a library's way of making another library."³⁴⁶ By this, Dennett is actually suggesting that we should not take a library as memes themselves but should distinguish the information housed within a library, the memes, as a replicator from the library as a phenotype or a meme vehicle. So, we can see more clearly that libraries, as vehicles for the memes, serve to promote the replication of those memes among scholars.

Some theories have been constructed to meet the need for the distinction, though many are found to be unsatisfactory. Dan Sperber, for example, distinguishes two basic types of representations. Mental representations are beliefs, intentions and preferences. Public representations are signals, utterances, texts, and pictures; they include what other writers have called symbolic forms.³⁴⁷ But Dan Sperber's distinction is found to be incomplete by J. M. Balkin because it does not take into account cognitive mechanisms like associations.³⁴⁸

F. T. Cloak's approach seems more helpful. He calls the set of cultural instructions people carry in their nervous systems, "I-culture". The material structures, relationships among material structures, and changes in these relationships which are actually brought about or maintained by behaviors of these cultural instructions, he calls, "M-culture".³⁴⁹ Features of M-culture thus include features of their behavior, their technology, their social organization, ideologies, etc.

The I-culture/M-culture interaction as summarized by Cloak makes clear the link to Dawkins' subsequent formulation of memes and their phenotypes.³⁵⁰ "An I-culture builds and operates M-culture features whose *ultimate function* is to provide for the maintenance and propagation of the I-culture in a certain environment. And the M-culture features, in turn, environmentally affect the composition of the I-culture so as to maintain or increase their own capabilities for performing that function. As a result, each M-culture feature is shaped for its *particular* functions in that environment."³⁵¹

Under such a categorization, Cloak's 'M-culture' covers Dawkins' examples of memes, such as, pots, arches and fashions for clothes,³⁵² while only the cultural instructions inside the brain which produced these artefacts would be considered the replicator whose 'purposes' are being served by these things.³⁵³ Dawkins later also adopted the I-culture-M-culture distinction: "I was insufficiently clear about the distinction between the meme itself, as replicator, on the one hand, and its 'phenotypes effects' or 'meme products' on the other. A meme should be regarded as a unit of information residing in a brain (Cloak's 'I-culture')."³⁵⁴

However, I would like to personalize Cloak's genotype/phenotype distinction in my own terms. I would name what is usually called I-culture by Cloak as *unmaterialized* memes and name Cloak's M-culture as *materialized* memes. I change the names of the concepts for two reasons. First, as I am taking a pure memetic view on what is called cultural elements by common people, I would not like to use still the concept of culture as the foundations of my memetic approach. It is for this reason that I rename Cloak's terms unmaterialized and materialized *memes*. Change of the

³⁴⁶ Dennett, *Darwin's Dangerous Idea*, London: Penguin, 1988, p202.

³⁴⁷ Dan Sperber, *Explaining Culture: A Naturalistic Approach*, Oxford: Blackwell, 1996, p24.

³⁴⁸ Balkin, p44

³⁴⁹ Cloak, "Is a Cultural Ethology Possible?", *Human Ecology*, 3:161-182. Quoted from Nick Rose, *Controversies in Meme Theory*. http://jom-emit.cfpm.org/1998/vol2/rose_html.

³⁵⁰ Nick Rose, *Controversies in Meme Theory*. http://jom-emit.cfpm.org/1998/vol2/rose_html.

³⁵¹ Cloak, "Is a Cultural Ethology Possible?", *Human Ecology*, 3: p170. Quoted from Nick Rose, *Controversies in Meme Theory*. http://jom-emit.cfpm.org/1998/vol2/rose_html

³⁵² Ibid.

³⁵³ Nick Rose, *Controversies in Meme Theory*. http://jom-emit.cfpm.org/1998/vol2/rose_html.

³⁵⁴ Dawkins, *The Extended Phenotype*, Oxford University Press, 1982, p109.

terms from *culture* to *meme* here actually means the switch of substantial perspective of view or fundamental conceptual transmission. Secondly, I abandon terms like memotype and memetic phenotype because they look too technical and uncommon to ordinary readers, who may have no much special knowledge of memetics or biology. In contrast, terms like *materialized and unmaterialized memes* can express the equally clear and rigorous meanings, and be more easily understood by the people specialized mainly in the field of law.

The two concepts of materialized and unmaterialized memes can be further refined. If a meme has in the physical and tangible world its physical object(s) and/or other tangible beings that is/are originated from the meme, then we define the physical and tangible objects as the *meme materialized*, or *m-meme*; and we define as *unmaterialized meme*, or *u-meme*, the meme from which the physical and tangible objects originated or the meme from which no physical and tangible objects originated. And I define the process involved from u-meme to m-meme as the process of *materialization*.

As a meme is "information residing in the brain", it is a mental being in the internal realm of human mind. When a meme first comes into being, it is always the internal mental being, or an unmaterialized meme. However, many of memes will later exhibit themselves physically in some knowable forms to the cognitive apparatus of people, then they become materialized.

Materialized memes have many concrete forms that people are usually very familiar with, among which physical objects might be the most common group, like a painting as the m-memes of a painter, a book as that of a writer, etc. For example, religious memes themselves are unmaterialized memes but they can also have their corresponding materialized counterparts, like churches.³⁵⁵ The belief in Jesus' existence is an unmaterialized meme but a painting or a statue of Jesus is a materialized meme of Jesus.

Besides, other knowable beings like actions, attitudes, which can also be perceived by the people around, are also m-memes when they are activated by an internal u-meme. The actions of rape, expressions of disgust at a rapist are examples of these kinds.

According to the definitions, materialized memes and unmaterialized memes do not enjoy equal status. The u-meme is the thing-in-itself, while the m-meme is the external form of the u-meme. Therefore, u-meme has the absolute decisive effects upon m-meme while m-meme does not have the decisive effects on u-meme. So u-meme can exist independently from m-meme while no m-meme can exist independently from its u-meme source.

That's why we can easily find u-memes without any materialized form, like a little secret one wants to keep only to him/herself. Any individual can suddenly have a meme come into his mind and he keeps it to himself, and the meme is unmaterialized. Later the individual writes or speaks it out to other individuals, then the meme is materialized because it is now tangible when spoken or written down. So, though u-memes do not necessarily turn out to be physical and tangible, all m-memes must be originated from u-memes. For example, any special food must be from a special meme of certain person or certain group of people.

Another point that need to be paid special attention to is what is called the contingency of materialization, which means that even the same unmaterialized meme may have different materialized forms while the same materialized forms may be

³⁵⁵ Of course, a church is usually a comprehension of different memes materialized: religious, architectural, technical, etc.

from essentially different unmaterialized memes. A person may do many deeds out of the belief in Jesus: he prays regularly, he often reads the Bible, he would like to tell other people about Jesus, etc. But all these are the materializations of the same belief. Because of the changeability of the materialized forms of memes, we may not be able to tell what unmaterialized meme lies under a materialized form. For example, we cannot decide that a young man is a Christian just from seeing him wear a cross. In China, for instance, this could actually be the underlying meme to catch fashions. Or we cannot either decide a person believes in Jesus for the reason that he says so as here might underlie the meme to lie.

Though m-memes do not have any decisive effects on u-memes. They do be able to have some influences on u-memes. The most important function of m-memes is as the vehicle to spread the u-meme because human cognitive apparatus cannot yet directly read other people's mind. But the most important function of the distinction in this thesis is the reconceptualization of the general concept of culture with the individualistic concept of meme, which I will discuss later in the final chapter.

3.2.2 Memetic methodologies for Chinese marital rape problem

1 Basic features of the memetic methodology

Having introduced the basic theory of memetics, I will now construct with it the concrete methodologies for Chinese marital rape problem. Memetics can have many applications in the study of culture and law, however, the biggest value it can be of in my thesis is its sub-individual perspective on cultural elements, or memes. Therefore, adverse to the *generality* of current culture approach, the basic feature of my proposed memetic approach to cultural studies in law is its *individuality*.

Current culture approach must first assume the existence in the society of a general entity called culture before anything else could be done. The memetic approach however does not assume the existence of culture; actually, it does not make any *a priori* assumptions at all. As a result of its individualistic nature, to apply memetic approach in cultural studies requires more empirical research of individual cultural elements, or memes, so as to find out whether or not there are enough memes to form the general culture.

In the current discussions about marital rape in China from culture perspective, the opponents of the criminalization of marital rape assume the existence of Confucian family ethics as the general culture in current Chinese society while the supporters rely on the notion of women's rights.³⁵⁶ On the other hand, the memetic approach involves no assumptions but surveys.

Another reflection of the generality-individuality distinction between the current culture approach and the memetic approach lies in their different objects of study. Individual cultural elements, or memes, are always the objects of study for the memetic approach. The memetic approach does not study general entities, although the memetic approach sometimes also needs to determine some general or collective features of individual memes, like the general distribution of memes, etc.³⁵⁷ But these general and collective features are just the external forms or patterns of the memes not the substantial entities of memes *per se*. The substantial entities as objects of study are always the individual memes.

³⁵⁶ See Chapter 3.1 of the thesis.

³⁵⁷ Meme-complex, for example, is a rather general concept in memetics, which is substantially equivalent to what is usually called as culture. But conceptually speaking, the two are essentially different.

Both Confucian ethics and women's rights notion are independent entities that do not need to rely on the ideas of any women's individuals in current Chinese society to exist. So, with current culture approach, both the opponents and the supporters of the criminalization of marital rape have generalized the concerned cultures into specific materialized systems of theories or notions. In contrast, with memetic approach, what is studied as culture is quite different. It's neither the Confucian family ethics nor the women's rights values; rather, it is all the personal ideas of human individuals in current Chinese society that are related to the marital rape problem. To memetics, these individual ideas or memes are what culture essentially is. To put it in the terms of the usual concept of culture, these individual ideas are just the microscopic cultural elements. When one group of similar ideas has gained the general and common acceptance of the people in the society, these microscopic elements will make the usual concept of culture. So, memetic approach also does cultural studies in Chinese marital rape law but with quite different objects of study from those of general culture approach.

The third indicator of the generality/individuality distinction is the different sources for collecting data about culture. The source of information about culture can be single for current culture approach which, for example, can be only Confucius. The memetics sources of information on culture, on the other hand, are multiple. In order to study the cultural factors in Chinese marital rape law, theoretically, one ought to ascertain the ideas of each Chinese person about the problem. This is obviously impossible. Therefore it is necessary to ensure that the methods used for sampling and obtaining statistical results are scientifically reliable, which can therefore give as precise a reflection as possible of the individual ideas of each person. The difference in the sources of information is, in some degree, the transformation of the difference of what is taken as culture by current culture approach and the memetic approach.

With the fundamental difference in methodology, the memetic approach also relies on an essentially different logical premise from that of the current culture approach. When studying the cultural factors in Chinese marital rape law, the culture approach relies on only one or two theories as the premises for all the further reasoning and conclusions. But the memetic approach cannot do that. It must rely only on social reality. It is for this reason that empirical research is necessary before anything can be said about the concerned cultural elements of Chinese marital rape law. In the eyes of memetics, only the living memes in current society are the true and live culture. A well known notion or theory, words of a famous book or person, in contrast, cannot guarantee a true reflection of social reality. The Christian Bible is well known nowadays in China but you cannot say the present Chinese culture is a Christian culture. Confucianism is also to known to many westerners, but it is hard to talk about the living cultural elements of Confucianism in the current western societies. So, to the memetic approach, culture can only be found in the lively social reality. Whatever the social reality is, whatever theoretical foundation it has. As long as the social reality is there, the memetic approach will not worry about the lack of its theoretical foundation. It therefore does not have use the often illusionary theoretical foundations as the general culture approach does. Consequently the memetic approach will not be in the embarrassing dilemma of the discrepancy between the derivational conclusions of culture from the assumed theoretical foundation and the empirical conclusions of culture from the social realities.

Upon different foundations, different reasoning processes are adopted by current culture approach and the memetic approach. The current culture approach adopts a type of deductive reasoning. As previously discussed, with a general ethic, say

Confucianism or women's rights notions, the current culture approach derives from the general ethical dogmas the special legal conclusions about the concrete problem of marital rape.

Memetic approach, in contrast, does not draw conclusions by a deductive derivation. Instead, it stays close to social realities: not only to ascertain culture itself as the living ideas of people but also to explore the empirical mechanisms by which culture elements exert their influences on law. In doing this, the memetic approach is not interested in metaphysical or pure ethical derivations but always tries to be positivistic and empirical.

2 Normative meaning & Meme: memetic approach for analysis of cultural environment

Any social event or action must be both descriptive and normative. By descriptive, I mean that any social event or action must contain as the core a physical event or action, like the physical event of an explosion or some bodily movements of a human being. So far, these events or actions are only the objective parts of the physical world, and we can only talk of them in pure descriptive terms because they are not "social" yet.

In order to qualify as a *social* event or action in a society, the event or action must have certain special *meaning* or judgment of values attached to it by the people in the society. Once this meaning or judgment of value is attached to the event or action, we can talk about it not only in pure descriptive terms but also in normative terms. This is what I mean by being normative. Only after this normative meaning is attached, can an event or action be *social*. So not every kind of contact between human beings has a social character; this is rather confined to cases where the actor's behavior is meaningfully oriented to that of others. We can see the following example for illustrations:

"For example, a mere collision of two cyclists may be compared to a *natural* event. On the other hand, their attempts to avoid hitting each other, or whatever insults, blows, or friendly discussion might follow the collision, would constitute *social* 'action'".³⁵⁸

The natural event of collision is descriptive while the subjective attempts, insults, ect. are the normative meanings attached to the collision that make it social. Thus, the concept of meaning is one of the most fundamental concepts in the understanding of *social* action. With this concept, we know that the natural event alone cannot be a social problem because it is meaningless. Only after subjective meaning is attached, can people have an attitude towards a natural conduct and then can the conduct be social. Therefore, what social problems the collision would cause, or what different reactions to the collision would occur between the two cyclists - be it insults, blows, or friendly discussion - depends on the different meanings attached to the collision.

Legal problems are social problems. Whether the natural conduct of a person constitutes a legal problem or not, accordingly, also depends upon the subjective meaning attached to the conduct. Adultery and rape are very good examples of this. The conduct of sexual intercourse, or even coercive sexual intercourse, does not, *per se*, necessarily constitute crimes. Apart from the natural existence of such conduct, it

³⁵⁸ Max Weber, *Economy and Society*, New York: Bedminster Press, 1968, p113. Italicized by the author of the thesis.

is the subjective meaning granted to the conduct that plays the key role in deciding whether the conduct is criminal or not. If an appropriate meaning is attached, even the coercive sex without the consent of the woman will not be criminal, of which marital coercive sex under the traditional Chinese law is an example. The subjective meaning granted by Confucian ethics to coercive sex between husband and wife determines the legitimacy of it. If the subjective meaning attached to a conduct has changed, the same conduct which used to be legal can be criminalized. And this is the case of the current legislative criminalization of marital rape in China.

On the other hand, if an appropriate meaning is attached, even sex with the consent of the woman can also be criminal. Adultery under the traditional Chinese law makes the example. Adultery refers to the voluntary sexual intercourse between a married person and a partner other than the lawful spouse. Though the natural act of sex *per se* is the exactly the same as any voluntary sex between men and women, however, a special subjective meaning is attached to adulterous sex by the combination of the traditional Confucian ethics and the marital factors of the involved party, leading to the criminalization of such acts. Now adultery is no longer a crime according to the current Chinese law in the People's Republic in China.³⁵⁹ Adultery is decriminalized because people have now a different understanding about the acts, or, in other words, they are attaching a different meaning to the hitherto "adulterous" conduct. This is to say that the decriminalization of adultery results from the change of the subjective meaning attached.

The contrast in Chinese laws between the criminalization of marital rape and the decriminalization of adultery evidences the decisive effects of the subjective meaning upon the changes in the legal treatment of these actions. We can see the significant concept of meaning in understanding general sociological problems remains its significance in the legal problems. Actually in terms of the importance of subjective meaning in the understandings of the problems of law, we can get more support from Geoffrey Samuel.

Geoffrey Samuel has raised similar theory about the constructions of social facts, claiming that legal systems not only have different solutions for but also different descriptions of the problems. According to Samuel, law as a science (*intellectus*) does not operate directly on the facts (*res*). And what lawyers do is to construct a model of the social world and it is this model that acts as the bridge between the social and legal worlds. The model is both the *res* and the *intellectus*.³⁶⁰ And the constructed model of facts might well be an active step in the process of reaching a solution in a case.³⁶¹ Therefore this fact construction can be seen as a kind of pre-categorisation: that is to say, it is a preliminary categorisation before the facts are formally assigned to an established legal category.³⁶² And thus the construction --- and reconstruction --- of facts is as important as any search for, or an application of, a rule.³⁶³

As for how the construction of the facts goes, Samuel describes as follows: "It is a matter of how facts are viewed, of how particular aspects are emphasised; thus it may be a matter of emphasising a whole as opposed to its parts, or vice versa."³⁶⁴

³⁵⁹ But in Taiwan it still is. "Art. 239 A married person who commits adultery with another shall be punished with imprisonment for not more than one year; the other party to the adultery shall be subject to the same punishment." See Major Laws of the Republic of China (LIU FA QUAN SHU). See, *Major Laws of The Republic of China on Taiwan*, Magnificent Publishing Co. Tainan, 1991, p1097.

³⁶⁰ G. Samuel, *Epistemology and Method in Law*, Ashgate, p2.

³⁶¹ Ibid. p1

³⁶² Ibid. p1.

³⁶³ Ibid. p1

³⁶⁴ Ibid. p1.

Interestingly, he also gives a car crash example for illustrations of what the constructivism exactly means:

“The direct object of legal analysis is not a car crash involving this and that particular type of vehicle, nor is it the actual transaction involving a delivery of a cargo of rotten oranges. Nor, again, is it the particular type of spikes built, or holes dug, on a specific individual’s land so as to interrupt a neighbour’s ballooning activities or his water supply. Facts are abstracted version of these events in which a car is interchangeable with a van and oranges with bananas, just as spikes can be replaced by holes.”³⁶⁵

So, a natural event alone is not sufficient to constitute the problem of life or law. How people understand it, which is the meaning attached to it, plays an essential part as well. As meaning is found to be so important by many theorists, what is meaning anyway? What decides the meaning of social contact between individuals? Or, to be specific, what is the relationship between the subjective meaning and cultural elements, or memes, in Chinese marital rape law?

There is in fact an equivalent relation between the two. To memetists, as we have known, the collection of memes and meme-complexes constructs the mechanisms or tools of human understanding. So, whatever subjective meaning attached to a natural event depends on the memes in the mind of people. In this sense, memes decide the normative meaning. Moreover, the subjective meaning itself, once generated, is just another meme. Since memes can refer to any units of information or entities, therefore, in the memetic eyes, the subjective meaning, as a unit of information or a human mental entity, is of course also a meme or memes. People’s attitudes towards marital rape are reflections of certain cultural elements, Confucian ethics or women’s rights values, and we know such attitudes can also be interpreted as subjective meanings. Thus we can see an equivalent relation between these two conceptual systems. Meanings are memes; memes are meanings. Or, to be specific, in terms of marital rape, people’s attitudes or ideas, either criminalization or decriminalization, which is decided by the normative meanings, can also be said to be decided by memes, the equivalent of the normative meaning.

The equivalent relation between the concepts of meme and meaning is significant for the construction of the memetic approach. As previously said, a natural action alone, like the collision of two cyclists, cannot by itself constitute a social problem. It is the normative meaning that decides what social problem it will constitute: if the cyclist thinks that the collision is tolerable, a friendly discussion may follow; if he takes it as irritating and unbearable, there might be a fight.

Similarly, the natural actions of sex are just the neutral and objective events in the physical world, without subjective meaning, or memes, involved yet. Only after the subjective meanings are attached, or the memes mixed in, can they be certain social problems in human society. Thus the problems of marital rape or adultery can be divided into two parts: the pre-cultural natural actions and the subjective memes of the meanings attached.

However, some memetists may not agree to such a division. They will argue that even the natural actions must be known to the human mind before they work to constitute a social problem. And once the natural actions are known to the human mind, they are no longer a pure objective and natural beings but have also turned into the memes in human mind. Thus the dichotomy of the objective and subjective constituents of the problem of marital rape or adultery are actually both subjective

³⁶⁵ Ibid, p2.

memes. As memes are the basic units of culture, there exist no pre-cultural beings here.

To answer this question, it is necessary to introduce the distinction recently made in philosophy of science between "epistemic values" and non-epistemic values. As a very successful tool for modern people to know and change the world, science is usually a solely epistemic apparatus and scientific cognitions are therefore epistemic memes. Recently a philosopher, L. Laudan makes a distinction between epistemic values and non-epistemic values.³⁶⁶ According to him, epistemic values are related to a special type of question "what should we accept as knowledge (or a fact)?" Logical consistency, empirical adequacy, simplicity etc. are the criteria to answer such a question, and they are called epistemic values. Knowledge of modern science, usually, goes to this category.

On the other hand, other values are supposed to be used to answer the broader question "what should we do?" These are non-epistemic values. So, the so-called non-epistemic values are the memes that decide what reactions the people should make to an event, to another person or the world around him/her. Thus, non-epistemic values are rather a sociological than a scientific concept. From this definition, we can tell the non-epistemic values are in fact what I refer to as normative meanings.³⁶⁷

In the general sense, the epistemic values are of course a part of culture. But when we talk about the legal problem of marital rape and its relationship with culture, the concept of "culture" here does not refer to the epistemic values, which deal only with the cognition of the natural actions of marital coercive sex. Instead, the "culture" here refers to non-epistemic values that attach some meanings to the epistemic values to make the actions "social". Thus, in the problem of marital rape, though the epistemic memes to cognize the natural actions of marital coercive sex and the non-epistemic memes to attach the normative meanings are both memes, there are still essential differences between these two groups of memes. The epistemic memes of a natural action are more likely to stay the same in different times and different societies but the non-epistemic memes to attach special social meanings to the action are more easily changeable. For example, the recognition of the existence of actions of the marital coercive sex is the same for both the supporters and the opponents of the criminalization of marital rape, but they attach to the same epistemic memes opposite non-epistemic memes, which exhibit as opposite meanings of criminalizing and decriminalizing marital rape.

So, in the memetic eyes, even if we discard the concept of the natural actions and adopt the concept of epistemic memes, we can still have an essential distinction between the two constituents of the problems of life. With this distinction, we can still have strict definition of the cultural elements related to the marital rape law. I define culture only as the non-epistemic memes that work as the special normative meanings attached. The reason I do this is that only these non-epistemic memes cause the differences in the ethical and legal status of marital coercive sex in different cultures and societies. The epistemic memes that only cognize the natural action of coercive sex between husband and wife is therefore defined as the pre-cultural memes.³⁶⁸

Thus, in terms of the particular problem of marital rape, I can transform the distinction between the epistemic memes and the non-epistemic memes into the

³⁶⁶ See Laudan, Larry, *Science and Values*, University of California Press, 1984, pxi, xii.

³⁶⁷ The sociologists who pursue to make sociology a science preach the so-called "value-free" principle. With this distinction between epistemic and non-epistemic values, we know that the "value" in this "value free" sociology refers to non-epistemic value. By "value free", the sociologists' actually claims for epistemic values to be free from non-epistemic values in sociology.

³⁶⁸ This is only in terms of the specific problem of marital rape.

distinction between the pre-cultural memes and the cultural memes. That I call epistemic memes “pre-cultural” is not to deny their nature as basic cultural units. Rather, in the context of marital rape, the epistemic memes are the same in all the different cultures while only the non-epistemic memes are different. As a result, it is the non-epistemic memes that are responsible for all the differences in marital rape laws. With this essential difference between the cultural and the pre-cultural memes, I can therefore keep on using the usual terms of the objective actions/facts v. the subjective meaning/memes to mark the differentiation.

3 Zweigert and Kötz’s problem of life: memetic approach to influence-exerting mechanism of culture on law

Laws are memes, individual memes. This is obvious. In the codified law systems, laws are made by the legislators. When the legislators have the memes in mind, they write them out and make statutory laws. So, statutory laws are memes, the materialized memes of the individuals called legislators. In the case law systems, when deciding a case, the judge will use his own reason to try to find out the law in the precedents. The memes he or she has collected from the precedent lay down a new rule, and that is the judge-made law. So judge-made laws are also memes, and they are the individual memes of the judges. In a word, laws are memes and they are the individual memes of the lawmakers.

Since the individual memes of lawmakers are the direct source of law, therefore, any memes, if they want to play a role in law, must first become the individual memes of the lawmakers. Memes as basic units of culture are usually widely spread in the society, so it is not that difficult for them to spread to the mind of the lawmakers and become their own individual memes. Actually the question might be the other way round. There are so many memes going around in the society, giving the lawmakers too many memes in their mind. It is hard to be certain which meme in the lawmaker’s mind will make itself the law. So, theoretically, any meme, once getting into the lawmaker’s mind, has the chance to become law.

For example, if a lawmaker one day occasionally has a meme in his mind that he would go to movie with his girlfriend that night, theoretically, this meme has the chance to become law. Vincent van Gogh’s paintings are surely some brilliant memes, which could easily attract a lawmaker and get into his mind. Then, these memes of van Gogh, from which his paintings are materialized, get their chance to play a role in the law made by the infected lawmaker. Similarly, Confucian family ethics, when taking over the lawmakers, can also make itself law. This has already happened. Though China is not a case law country, many Chinese judges, with their mind occupied by the memes of Confucian ethics, decriminalized marital rape in practice, despite its inconsistency with the legislation. On the other hand, if the notions of innate women’s rights and gender equality dominate the mind of the lawmakers, they have their chance to become law just as any other memes. As laws are individual memes of the lawmakers, this could happen even when the general social environment is not yet ready for it. This is actually what has already happened to the legislators in the People’s Republic of China who made the law criminalize marital rape.

The battle in the lawmakers’ mind between different memes for a role in law highly resembles the competition between thousands of sperms around the egg for insemination. For each there is a chance of victory. For each there is a risk of failure.

Eventually all the chances and risks for memes result in contingency of man-made law and its risk of inconsistency with what we expect it to do.

It is not every arbitrary or random meme that occurs to the lawmakers that *ought* to become law, no matter how beautiful, brilliant or interesting it might be. Legal memes ought to be different from the non-legal memes. The differences should lie not only on a formal level as the memes of the special individuals of the lawmakers; the differences should also lie in the essential level inherently in the memes *per se*. This is because the law has its own special function as solutions of problems of life.

For example, the function of law is not to entertain or art. So, movies or famous paintings of van Gogh cannot directly become legal memes even if they have already spread into the lawmakers' mind. Law is also not to function as the sheer textbook or preacher of certain ethics, so, ethical teachings of Confucius, values of innate human rights and gender equality or any other ethical memes cannot necessarily be made legal memes either even though they have taken over the personal minds of the lawmakers. Not every non-legal meme can surely turn into a legal meme. Any cultural element, or meme, must meet some prerequisites, go through some proper channels, or resort to certain mechanisms to play a role in law.

What, then, lies between the law and the non-legal memes? What bridge does a cultural element, or a non-legal meme, have to cross in order have its impact on law? To explore this influence-exerting mechanism of memes on law, it would be helpful to take a functionalist view to recheck Zweigert and Kötz's "problem of life".

According to Zweigert and Kötz's functionalist methodology of comparative law, "The basic methodological principle of all comparative law is that of *functionality*. From this basic principle stem all the rules which determine the choice of laws to compare", and "in law the only things which are comparable are those which fulfil the same function".³⁶⁹

The functionality here refers to laws as the solutions for problems of life. As Zweigert and Kötz say: "different legal systems give *the* same or very similar solutions, even as to detail, to the same problems of life, despite the great differences in their historical development, conceptual structure, and style of operation",³⁷⁰ and why comparative law is possible is fundamentally because "the legal system of every society faces essentially the same problems".³⁷¹

One can infer from Zweigert and Kötz's approach that they think problems of life are why laws need to exist because the law functions as the solutions to the problems. The thesis agrees with the problem of life's crucial role to law, but we need to check the conclusion that "the legal system of every society faces essentially the same problems".³⁷²

Zweigert and Kötz's problem of life refers actually to the realistic problem existing in complicated social relations, which is rather a sociological than a legal concept. "(T)he problem must be stated without any reference to the concepts of one's own legal system", it "must be posed in purely functional terms".³⁷³ With the functionalist character, the concept of the problem of life, if more rigorously defined, is not a legal but purely a sociological one, which exists as the part of the concept of social relation defined in rather general sociological sense. So Zweigert and Kötz's problem of life must share essentially the same constituents as general sociological

³⁶⁹ Zweigert & Kötz, p34.

³⁷⁰ Zweigert & Kötz, p39.

³⁷¹ Zweigert & Kötz, p34

³⁷² Zweigert & Kötz, p34

³⁷³ Ibid.

problems: the objective fact and the subjective meme. Therefore if we say two problems of life are the same, we must be sure that *both* their constituents, the objective and the subjective, are the same.

Marital rape is a good example. When the functionalist compares marital rape laws in different societies, he presupposes the societies face essentially the same problem of life of marital rape. However, when deciding whether the same problem of life of marital rape exists in different societies, we must consider both of its two constituent parts: the objective fact, which is the action of coercive sexual intercourse between husband and wife, and the subjective meme of the action, which is the judgment of to what extent the action ought to be condemned. Only when both the constituents are the same, can we say the same problem of marital rape exists in the societies under comparison.

Suppose the objective fact of *coercive sexual intercourse* between husband and wife exists in every society. There is the other factor left for us to consider, the subjective meme about the action, to decide whether marital *rape* exists as a problem of life. Only when the subjective meme dictates that the action of marital *coercive sex* is bad enough to be condemned as a crime, can marital *rape* exist as a problem of life. In order to be more explicit, I will carry out my analysis in five different situations:

1. If a husband and wife agree that the action of coercive sexual intercourse between them is nothing more than a minor unpleasant quarrel between lovers, or at most is immoral but still a private matter for them, which is still far away from or totally irrelevant to the crime of rape, then there is no problem of marital rape to them. If all or sufficient majority of husbands and wives in the society share the meme, then the problem of life of marital rape does not exist to the majority people or to the society as a whole.
2. If a husband and wife agree that the action of coercive sexual intercourse between them, same as that between a man and a woman who have no marital relations, amounts to the crime of rape, then the problem of marital rape exists to them. If all or sufficient majority of husbands and wives in the society share the meme, then marital rape exists as a problem of life to the majority or to the whole society.
3. If the wife thinks her husband's action of coercive sexual intercourse with her amounts to the crime of rape while he does not, then marital rape exists as a problem of life to her but not to him. If all other or sufficient majority of people in the society share her meme, then marital rape exists as problem of life to the majority or all people in the whole society; if all other, or a sufficient majority of, people in the society share his meme, then marital rape does not exist as problem of life to the majority or the whole society.
4. Given the disagreement between the wife and the husband in case 3, if some people share her meme while the others share his with neither gaining the prevailing position, then there is a dispute about the existence of the problem of marital rape. If the small group of legislators share her meme while the mass share his, statutes criminalizing marital rape may possibly be made but may not be efficiently workable in operation.
5. Given the disagreement between the wife and the husband in case 3, if all or sufficient majority of people in society A share her meme while all or sufficient majority of people in society B share his, then marital rape exists as problem of life in society A but not in B. Thus the two societies do not share the same problem of life of marital rape even if the same objective fact of coercive sexual intercourse exists in both societies.

The above analysis tells us two things. First, subjective meaning is the inalienable part of a problem of life. Objective facts alone, either a human conduct or an event, which are neutral and free from any subjective judgment of values, cannot constitute the problems of life in the society. It must combine with some subjective memes to constitute concrete problems of life.³⁷⁴

Secondly, as the law functions as solutions to the problem of life, the problem of life is the only factor that directly affects law. Cultural factors, values, beliefs, or other memes, can affect law only after they become the constituent of the problem of life.

Attitudes toward the act of marital coercive sex are the subjective memes that are usually referred to as cultural elements concerning marital rape law. To play its role in law, these memes first become the subjective constituents of the problem of life called marital rape. Once the problem of life contains these cultural elements, they will inevitably influence its solution called marital rape law. With this knowledge, one can have a better understanding about the current dilemma of Chinese marital rape law. The legislation that criminalizes marital rape is only the individual memes of legislators. But if the memes are not shared by most people in the society, especially those who are involved in the actions of marital coercive sex, then no problems of life are actually constituted even though the natural actions exist. Without the existence of the problems, the solutions are of course unnecessary and useless. Naturally, current marital rape law, even though it is legislated, does not have the chance to operate in practice.

In short, why marital rape law is not working is because marital rape as a problem of life exists to the legislators but not to the judges nor to the majority of the society.

Three conclusions can be arrived from the above analysis:

First, it is the two constituents together that decide whether valid or not to assume that "the legal system of every society faces essentially the same problems".³⁷⁵ Only when both of the constituents are the same, can the basic functionalist assumption be valid. Otherwise, the assumption is invalid. In chapter 5 I will go on to disclose the fallacies that the unreliable assumption has caused to the functionalist methodology of comparative law.

The second conclusion is more important, which is the about the concrete mechanism of how memes exert effects on law. Problems of life are the practical instruments of memes to affect law. If a meme is to affect law, it must first merge into the problem of life to be the subjective constituent of it, which will consequently cause the corresponding effects on law as the solution of the problem. With the meme as the part of the problem, law as the solution will inevitably be affected by the meme.

The third conclusion is about the relation between the problem of life and the problem of law. Laws are solutions to the problems of life, therefore, when a problem of life needs law for its solution, it becomes a problem of law. However, not every problem of life needs law for its solution. For example, I have a toothache, and I attach to this natural event the subjective meaning of being problematic for my life, so it is a problem of life. But it is not necessarily a problem of law because it is more likely that I will go to a dentist than a court for the solution. So, problems of law are

³⁷⁴ Of course, both the two constituents are indispensable for a problem of life. The subjective meme alone, without its corresponding objective being, cannot constitute social problems either. For example, if human beings had no gender, there would be no existence of sex and there would be no marriage law, divorce law etc. Under such circumstances, pure concept of dissolution of marriage alone would also be too abstract to constitute any real problems of life, it must combine with certain physical reality to make itself real, to make the combination materialized as concrete problems of life, which then trigger the making of the law concerned.

³⁷⁵ Zweigert and Kotz, p34.

definitely problems of life but not all problems of life are problems of law. Only some problems of life are problems of law.

I can describe as the following the difference between the problem of life and the problem of law from the perspective of their constituents:

As long as a natural event is attached a subjective meaning of being problematic in any sense of life, they constitute a problem of life. Only if a natural event is attached a subjective meaning of being legally problematic, can they constitute the problem of law. However, the same problem of life can possibly be different problems of law if understood from different legal perspectives.

For example in China if a tourist who joins a package tour of a tour agency is injured in a traffic accident, he can start the legal action against the tour agency on two different legal grounds, either for tort or for breach of contract. And often he will get very different results in compensation. In this case, we have the same problem of life, which is the physical injury of the tourist plus the subjective meaning of thinking the physical injury is problematic and ought to be compensated. But the more specified subjective legal meaning of being problematic can be either because of tort or because of breach of contract. And the two different understandings will accordingly result in two different problems of law.

3.3 Analysis with the memetic approach

3.3.1 Analysis of current cultural environment of Chinese marital rape law

Now I have transformed the concept of general culture into the concept of meme and I have also given an even more strict definition of what culture exactly means in terms of the marital rape law problem. The key point I have been trying to make is the separation of the cultural elements, the non-epistemic memes, from the epistemic memes about the natural actions of marital coercive sex. With the separation, I can start the concrete analyses of the cultural elements in current Chinese society concerning the marital rape problem.

1. Marital coercive sex as social and legal facts

Marital coercive sex as epistemic fact is well recognized. People who think such acts “do not exist at all” always have the low percentages of less than 10% in all the surveys. As it is still pre-cultural, we can see that such an epistemic meme is shared by both the opponents and the supporters of the criminalization of marital rape with high percentages, with data shown in the table below.

Percentages of People Who Think Marital Coercive Sex Does not Exist

Qingdao	Shenxian & Pengzhuang	Yongxing & Dachang
6.5%	7.1%	8.5%

The epistemic cognition of the natural fact alone cannot make it a *social* problem because it is only the neutral and value-free human cognition of the natural world with no non-epistemic elements involved to attach meaning to such fact. Though it is neutral and pre-cultural, however, as it is common and dominating in the current Chinese society, the well recognition of the existence of the fact of marital coercive sex lays down the material foundation of a social problem. As long as we locate the

non-epistemic memes of the meaning attached to the epistemic memes, we would find out its *social* status: whether the natural actions constitute a problem or not, and, if yes, what problem they constitute, ethical, legal or else.

Question 5 in the Questionnaire is one of the questions that give clear indicators of the corresponding meaning-attaching memes. The question has the following four choices about the personal opinions of marital coercive sex:

- (1). *Now that it is against the wife's will, the action is essentially the crime of rape.*
- (2). *Though it is bad, the action is not illegal because of their legal marriage.*
- (3). *The action is a kind of domestic violence and whether it is criminal or not depends on the specific circumstances or the seriousness of the case.*
- (4) *Nothing wrong with it*

Among all the four choices, virtually 0% of people take the final choice of “nothing wrong with it” while practically all the interviewees think the actions problematic one way or another. Therefore, the physical actions of marital coercive sex, with subjective meaning attached, become *social* problems, either ethical, or moral or legal.

Meanwhile, as shown by the results from Question 3 about the means to settle the social problems of marital coercive sex, there are quite a number of people who stand for legal involvement in the solution. The percentages were 40.2% in Yongxing and Dachang villages, 37.6% in Shenxian and Pengzhuang, 62% in Qingdao. The memes of these groups of people, obviously, attach the meaning to the actions of marital coercive sex as legal problems.

We can, therefore, draw tentative conclusions about the natural actions of coercive sex between husband and wife as social actions. As far as shown by the memes presently existing in Chinese society, there are the cultural elements in the current Chinese society that tend to make such actions legal problems. But there are two points that I need to stress about the conclusion.

First this conclusion is not based on any dogmas or notions of either the traditional Confucian ethics or innate human rights. Instead, this conclusion is based entirely on empirical data of individual memes collected in the surveys. Secondly, the conclusion makes a clear distinction between the pure epistemic memes and the meaning-attaching memes, which, as will be shown in later discussion, is of great significance for the memetic approach to culture and law.

2. The legal nature of marital coercive sex

As previously shown, there indeed exist the necessary memes to form the possible cultural environment for the legal solution of the problem of marital coercive sex, especially in the cities like Qingdao where the cultural environment is more favourable. However, the data seems to have shown that people who stand for a legal solution do not necessarily see marital coercive sex as the crime of rape.

As the data shows, when people view marital coercive sex as a possible crime, they mostly see it as common domestic violence rather than the crime of rape. When asked in Question 6 when marital coercive sex should be criminal, 63.3% people in Yongxing and Dachang chose “when the wife is physically hurt”, and the percentages are 60.9% in Shenxian and Pengzhuang, 68.5% in Qingdao. In contrast, only 10.1% of people in Yongxing and Dachang chose “as long as the wife says no”, and the percentages are 11.1% in Qingdao, and as low as 1.1% in Shenxian and Pengzhuang.

In relation to marital coercive sex, what current Chinese people most care about is the bodily harm caused, not the lack of women's consent to sex, which is essential to the concept of rape in modern sense. This is to say, with sufficient memes, there is a favourable cultural environment in current China for criminal legal solution of marital coercive sex as domestic violence or assault. But there might be no sufficient memes to form an favourable cultural environment to criminalize marital coercive sex as rape.

This is confirmed by the answers given to Question 5. Among the four choices, apart from the "nothing wrong" one, which was taken by nobody, percentages of people taking the first choice of "rape" are particularly low compared with those of the choice of "domestic violence", which are respectively 6.4% in Yongxing and Dachang, 6.9% in Shenxian and Pengzhuang, and 13.9% in Qingdao. Therefore, generally speaking, the existing cultural environment in China is not the one to suit the criminalization of marital rape.

Though memes are not yet sufficient for an favourable cultural environment in present China to criminalize marital rape, one of a meme's essential attributes is to replicate and spread in the society. If they find appropriate carriers, memes can be very powerful and efficient in permeating a society. Data seems to have shown that, though not well spread, memes suitable for the criminalization of marital rape have a very good chance of being widely spread in current Chinese society.

In the surveys, when the interviewees were first asked in Question 5 about their own attitudes towards marital coercive sex, few were easily and readily to equate it to the crime of rape (see the results previously given). However, when they were later confronted with the court's guilty verdict of rape in Question 8, there were prompt increases in the percentages of the people who would accept the idea of criminalizing marital rape.

In Yongxing and Dachang, 31.6% of people found the verdict of rape reasonable, which is an increase of 25.2% over 6.4% of those who voluntarily took the "rape" choice in Question 5. In Shenxian and Pengzhuang, the increase is about 20% from 6.9% to 26.8%. Qingdao even shows a striking increase of almost 56% from 13.9% to 70.1%.

The data show that though most people do not currently have the memes in mind adapted to the criminalization of marital rape. However, once they get the information from the legal authorities like the courts, many would quickly accept it. This sudden change of mind demonstrates the great potential of the relevant memes to quickly spread themselves with the appropriate carriers. This is very helpful to form an environment suitable for the criminalization of marital rape.

The above increases take into account only those who took the "reasonable" choice in Question 8. There are also a small number of people in Question 8 who took not first choice of "reasonable" but the third one, "do not understand the reasons of the court but believe they have the reasons there". Obviously at least some of these people would accept the memes of marital rape once they get the explanations from appropriate authorities like the courts or other sources they trust in Question 11.

The existing cultural elements are mostly not so appropriate for the criminalization of marital rape. But the cultural environment is presently in the process of changing and there is a high chance for a more suitable cultural environment to come.

3.3.2 Analyses of influence-exerting process of culture upon Chinese marital rape law

Knowing what the cultural elements are like in contemporary China, we must now ascertain how the cultural elements exert influences on marital rape law. I will analyze the cultural influences on three different objects: legislators, judges, and the people.

1. Legislators

As shown in chapter 2, the current provisions of Chinese law make marital rape a crime. How did such provisions come about? How did the memes criminalizing marital rape manage to get the chance to play a role in current Chinese statutes? The legislative background may lead us to the answer.

In the codes of early Qing and before, wives were the complete dependants of their husbands, with husbands enjoying the absolute right over their wives.³⁷⁶ Also, rape, QIANG JIAN, was extramarital in nature.³⁷⁷ Under such provisions, marital rape is, by definition, impossible.³⁷⁸ It was the Revised Qing Code, DA QING XIN XING LV, in 1910 that took the first step in Chinese law on the long march to bring women equal status, which is essential for the possibility of the concept of marital rape. Though the first step seems rather small now, however, by decriminalizing the sexual relation of unmarried women with men, DA QING XIN XING LV started to erode the absolute inferior status of women that had lasted for thousands of years.

What caused such a significant legislative change? Legal reforms in late Qing, including the making of DA QING XIN XING LV, were mainly the result of commissions chaired by Shen Jiaben (1840-1913).³⁷⁹ Shen Jianben was a nation-renowned law scholar at the time. Like many people at his time, facing the survival crisis of Chinese nation, he strongly felt the need of reforms of Chinese laws, claiming that Chinese people "should refer to the laws of foreign countries and take the advantage of their remits for the improvements of Chinese laws".³⁸⁰ Therefore, in all the revisions of codes chaired by him, he firmly adhered to the principle of "merging the west into the Chinese". The revised codes not only imitated western laws in both structures and contents, but also followed the legal notions based on the innate equality and rights of people.³⁸¹ So the first step in DA QING XIN XING LV to liberate women from the sexual subjugation of men was actually activated by western legal cultures.

Here we see a vivid picture of memes spreading. Some memes traveled from western countries and spread into the minds of a small number of individuals in China: Mr. Shen Jiaben and his colleagues. After the memes have taken over these legislators' minds, the legislators, then, materialized these memes into the codes they made, which started the change leading to the concept of marital rape. Therefore, the memes did not go through the problems of life to play their role in Chinese legislation. They directly traveled through several individuals' mind and became the words of the written law.

Since they are newly come individual memes, they met fierce resistance from the exiting memes in China at the time. We see a typical battle between two kinds of

³⁷⁶ See Chapter 2.

³⁷⁷ See Chapter 2.

³⁷⁸ Ibid.

³⁷⁹ Wang limin, *The History of Chinese Law*, p459.

³⁸⁰ Ibid. p460.

³⁸¹ Ibid.

opposing memes, which often happens in the process of meme spread. The representatives of the conservative objectors were Zhang Zhidong and Lao Naixuan, who criticized that the Revised Qing Code had actually “corrupted the basic Chinese ethics (LI JIAO)”.³⁸² In particular, they argued, the decriminalization of the adultery by unmarried women was against the fundamental principle of the “differences between men and women (NAN NV YOU BIE)”.³⁸³ Among all the legal reforms in late Qing, the making of DA QING XIN XING LV was the most controversial and had also taken the longest time to complete. Though they had not taken over the mind of most Chinese people, the new legal memes from the west did manage to settle down in at least the minds of several Chinese legislators, like Mr. Shen Jiaben.

Later on, the Criminal Code of the Republic of China in 1928 redefined the concept of rape, eliminating its extramarital nature. And the Republican family law in 1929 prescribed in its General Principle that a woman is an equal “natural person” as a man.³⁸⁴ These further prepared the ground for the legislative recognition of marital rape as a legal concept. These changes were the results of the legislative principles at the time.

Two principles were followed in the making of both the Criminal and the Civil codes by the legislators of the Republic of China. One is to absorb the latest legal theories and legal principles of the western countries, referring also to the concrete codes of these countries. The other is to further eliminate the influences of traditional Chinese ethics (LI JIAO) on law.³⁸⁵ These two legislative principles clearly tell us that the legislators were the carriers of the new memes from the west, determined to help the new memes to defeat the old memes in Chinese society. Codes thus made are more likely to function to promote the spread of the new individual memes than to solve any realistic problems of life.

Current legislation in the People’s Republic of China has criminalized marital rape, with continuity from the law of the Republic of China. The continuous development of law concerning marital rape is a result of the continuity in legislative principle. Professor Wu Changzhen, one of the drafters of marriage law, says that, since the last years of Qing Dynasty in the end of 19th century, it has always been one of the most fundamental principles to modernize the Chinese society by the modernization of law.³⁸⁶ Under such a principle, the law will promote the modern ideas of gender equality and women’s rights and eliminate the feudalist ethics of Confucianism in the society.³⁸⁷ Therefore, in the eyes of the legislators, traditional cultural elements, like the Confucian family ethics, is not something that the laws they make should be based upon; but, rather, something that they should make the laws damage.

So, the brief legislative history provides a clear map of how the memes of the current legislative criminalization of marital rape have come about. We can see three characteristics of the development of the legislative memes.

First, the statutes are the result of the spread of western memes in China. The beginning of modern Chinese criminal law starts at the end of 19th century under the great pressure from the Western legal culture by means of directly transplanting or

³⁸² Ibid. p463.

³⁸³ Ibid.

³⁸⁴ See chapter 2.

³⁸⁵ Xie Zhendong, *The Legislative History of the Republic of China*, vol. 2, China Politics and Law University Press, 2000, p756; Wang Limin, *The History of Chinese Law*, China Finance and Economy Press, 2001, p515, p517.

³⁸⁶ Wu Changzhen, *Marriage Law and Me*, Law Press, 2001, p6.

³⁸⁷ Ibid. p7.

borrowing many of western legal elements.³⁸⁸ And the so-called modernization of Chinese law is in fact a process of westernization, this process has been a continual one in the last one hundred years.³⁸⁹ Many of the substantial changes from traditional Chinese laws originally came from pure western legal principles and notions. And the legislative criminalization of marital rape is just one of them. Though the legislation is materialized from memes in the minds of Chinese individual, the legislators, we can always trace the spread of the memes back to western countries where they originated.³⁹⁰

Secondly, the spread of the memes of marital rape has, by and large, been confined to the minds of a small number of legislators. This may be because it is rather easier for the memes to infect a small number of individuals, the lawmakers, than all the people in society. Besides, the lawmakers themselves are eager to borrow western legal memes. And this provides a very favourable environment for the memes of marital rape to occupy successfully the mind of Chinese lawmakers. Also, the legislative criminalization of marital rape, which marks the final success of the spread of the memes, is just a simple process of materializing some individual memes into written language. This is also much easier for memes to guide people's actual attitudes towards the actions of marital coercive sex. For these reasons, it is much easier for the memes of the criminalization of marital rape to spread themselves around legislators.

Finally, the memes of current legislative criminalization of marital rape are got by the Chinese legislators not from the observation of the wide-spread memes in realistic Chinese society. Instead, legislators ignored, consciously or unconsciously, the live memes in current society concerning the facts of marital coercive sex, and impose their personally preferred memes on the code. This manifestation of an ignorance of reality can be proved by either the judicial inconsistency with the statutes or the surveys in rural areas.

Briefly, the memes of marital rape exert their influence on legislators not through the problem of life, the proper channel that they ought to go through. Instead, the memes do so through pure memetic replication in the minds of the individual legislators. This is to say, cultural elements in the current Chinese legislation of marital rape does not seek to address something that is deemed by contemporary society to be problematic. Without responding to an actual social problem, the legislation is only the materialization of simple personal memes of the lawmakers.

2. Judges

Judicial decisions of the court are also the individual memes of the judges. Whether the judicial decisions are following the legislation or not depends on whether or not the legislative memes have taken over the minds of the judges. Legislative memes' domination in judges' minds is what usually happens in the codified legal systems. Unfortunately this does not seem to be what is happening in China in terms of marital rape law.

Indeed the legislative memes have taken over the minds of some judges, like those in the recent *Ping* case in Shanxi in 2001. But these are in a minority. While legislation criminalizes marital rape, empirical data shows that most of the judicial decisions firmly stick with the "no rape in marriage" principle. This is evident from

³⁸⁸ Li Xiandong, *From DA QING LV LI to the Civil Code of the Republic of China*, China People's Police University Press, 2003, p100

³⁸⁹ *Ibid.*

³⁹⁰ *Ibid.*

the results of the majority of the cases in the Table of Cases in the previous chapter, as well as from the case comments by the Supreme People's Court on *Wang* and *Bai* cases.³⁹¹ This means that the minds of most judges in China are still armed with the traditional memes that decriminalize marital rape.

Why so? The answer given in the comments on *Wang Weiming* case by the Supreme People's Court is: "it is because of the widely-accepted ethics".³⁹² So it is because the judges think the traditional ethics are widely accepted in society that they decide to take the side of the ethics and pay the prices of the inconsistency with the code. *Wang's* case is not the only one. In *Wu's* case in Sichuan, the judge, Long Chifang, conceded that the defendant had committed the legislative crime of rape, however, "thinking about the traditional ethics that people commonly hold about husband and wife", the defendant was not convicted. The psychology here of the judges can be well described by the doctrine of the partial supporters of the criminalization of marital rape, who think, though marital rape *ought to* be criminalized, unfortunately, "thinking of the actual conditions of our country, where traditional ethics are still deeply rooted in people's mind", we'd better not do it now.³⁹³ Clearly, the legislative memes have already got into many judges' mind, but another meme, the belief that traditional ethics are still dominating, greatly weakens the power of the legislative meme.

While the judges yield to the belief that most people are still loyal to the traditional ethics, data has shown that the people are actually ready to accept the new memes from the judges about marital rape. Take Qingdao for example, only 13.9% of people voluntarily take the choice of recognizing marital rape in Question 5 in the survey, however, when they are faced in Question 8 with the conviction of the husband's raping his wife, over 70% chose to accept it. The increase is as much as 56%, which is a very good demonstration of how powerful judges can be in spreading the legislative memes among the communities which are presently dominated by traditional ethical memes.

We see an interesting paradox here. Judges could have been very efficient spreaders of the legislative memes but they are now actually the helpers of the counter-legislative memes. However, the reason that judges fail to work as the spreaders of the legislative memes, as they ought to, is because the judges think there are too many people who have not yet accepted them. Such a situation ought to be reversed. This is because for any normal legal system judges ought to be the carriers or spreaders of the legislative memes. This legislative/judicial consistency is essential to any legal system. The second reason we must convert the judges is that once they are converted, they could be the most powerful spreaders of the legislative memes.

Such a conversion of the judges is easy to achieve. The tip is to weaken the memes weakening the power of the legislative memes in the judges' mind. The memes we need to weaken are the worries caused by the belief in the dominating status of the traditional ethics in current Chinese society. Specifically we could weaken such a belief by bringing another meme to the judges, which is the awareness that, though the traditional memes are indeed currently widespread in the society, the minds of most common people are now ready to accept from the judges different memes about marital rape problem. Thus, judges do not have to accept the traditional

³⁹¹ No. 1 Criminal Division, Supreme People's Court: *Reference for Criminal Trial*, vol.3 in 1999 and vol. 2 in 2000.

³⁹² *Ibid.*

³⁹³ Fu Liqing, "Marital Rape Should Wait---Between To Be and Ought To Be", *Cases and Judicial Interpretations of Criminal Law*, vol. 4, p416. Or the website: chinalawinfo.com/xin/disxwpl.asp?code=129&mark=1504 (2002/2/11).

memes just because they are currently widespread. And the conversion could be achieved. The legislative memes would take over the judges and let them play a much helpful role in the further spread of the memes criminalizing marital rape in the whole society.

However, instead of promoting the legislative memes, judges are presently working as enemies of legislative memes and allies of traditional memes. With the traditional memes in mind, marital coercive sex does not constitute the same problem of law to the judges as would be the case if the judges were subject to the legislative memes. With the different problems there, the judges certainly find the solution offered by the legislation improper. Unsurprisingly, the legislation of marital rape becomes ineffective.

3. The people

The above discussions about legislators and the judges seem to have explained from the legislative and judicial perspective how cultural elements resulted in the failure of current Chinese marital rape law. Now I will take a broader view to see how cultural elements work among the ordinary people to contribute to the failure of current Chinese marital rape law. Results of Question 5 in the survey confirm the current widespread of the traditional ethical memes among the people. In order to understand how these ethical memes work to influence marital rape law, I will take the advantage of the concept of the problem of life, the influence-exerting mechanism, to explain my interpretation.

I make these observations from the following three perspectives:

(1) No problems of life constituted

For those individuals, who think sex is the wife's duty to the husband, a wife should fulfil the duty even if she does not feel like it. Therefore, on the occasions that the wife resists the husband's sexual demands, it is alright for him to use force. To these people, marital coercive sex is not a problem at all but just a normal part of marriage life.

This "unproblematic" meme, once combined with the natural conduct of marital coercive sex, does not constitute a problem of life. And, according to Zweigert and Kötz, laws are just solutions to problems of life. As long as the problem of life does not exist, naturally, there would be no such a legal problem either. So, this type of meme does not make marital coercive sex a problem of law, let alone a crime.

The concrete process in which these memes work is by taking over the mind of the victims, the wives. When a wife with this type of meme suffers from her husband's coercive sex, she may feel the physical and psychological hurt; but, she will just grin and bear it. She is unlikely to complain because the memes have successfully prevented her from turning the hurts into complaints. The memes have attached to the actions of her husband the meaning that "it happens between husband and wife and it is normal".

Surveys have shown that there are a large number of females with this view in current society, especially in rural areas.

gender * sex and marriage Crosstabulation in Yongxing and Dachang

	sex is the necessary result of marriage	sex isn't the necessary duty, refusable
male	41.1%	58.9%
female	33.3%	66.7%

gender * sex and marriage Crosstabulation in Shenxian and Pengzhuang

	sex is the necessary result of marriage	sex isn't the necessary duty, refusable
male	48.5%	51.5%
female	54.2%	45.8%

gender * sex and marriage Crosstabulation in Qingdao

	sex is the necessary result of marriage	sex isn't the necessary duty,refusable
male	26.8%	73.2%
female	42.3%	57.7%

33.3% of the females interviewed in Yongxing and Dachang think sex is the necessary duty of marriage while the percentages are 54.2% in Shenxian and Pengzhuang, 42.3% in Qingdao respectively. Females with these memes are not likely to feel their legal rights have been infringed by their husband's coercive actions. Therefore, if these women suffer marital coercive sex, law will never know about the happenings. In this case, marital rape law is just in vain: actions of marital rape are happening but the victims refuse to use the law. And according to the data, there could be 33.3% to 54.2% of the actual happenings of the actions of marital rape to which marital rape law would possibly never be enforced.

(2) Circumvent the Law: Non-legal solutions

There are, however, many people who think marital coercive sex is a problem of life one way or another. In Question 5, 48% of the people in Yongxing and Dachang think that it is not illegal but at the same time feel that "it is not good". The percentages are 57.5% in Shenxian and Pengzhuang, 7.4% in Qingdao. We see a sharp difference here between rural areas and the cities. With as little as 7.4% of people having the memes of taking marital coercive sex as "not illegal" but "not good", this type of memes will not have much influences in cities like Qingdao. But special attention does need to be paid to these memes in rural areas.

With these memes, marital coercive sex does constitute a problem of life. It can be a moral problem, or a ethical problem or merely a minor problem between husband and wife in everyday family life. Whatever it is, moral or any other, the meaning attached by this type of meme to marital coercive sex is not as a *legal* problem. This consequently decides the preferred solutions to such problems. 60% of people in Yongxing and Dachang would like to take the non-legal solutions to the problem, either between the husband and wife or within the family. The percentage is 63% in Shenxian and Pengzhuang. The consequence is circumvention of marital rape law.

The concrete process of how the memes work is also by taking over the mind the female victims.

gender * nature of the action Crosstabulation in Yongxing and Dachang

	it is the crime of rape,without her consent	it is not illegal though it is not good	common domestic violence,circumstances decides
male	10.3%	41.1%	48.6%
female	1.3%	58.8%	40.0%

gender * means of dispute settlement Crosstabulation in Yongxing and Dachang

	it's personal privacy that needs no external interference	settle within family before senior members but not in court	go to the court if necessary
male	54.2%	5.6%	40.2%
female	46.9%	13.6%	39.5%

gender * nature of the action Crosstabulation in Shenxian and Pengzhuang

	it is the crime of rape, without her consent	it is not illegal though it is not good	common domestic violence, circumstances decides
male	12.1%	42.4%	45.5%
female	3.9%	64.7%	31.4%

gender * means of dispute settlement Crosstabulation in Shenxian and Pengzhuang

	it's personal privacy that needs no external interference	settle within family before senior members but not in court	go to the court if necessary
male	51.5%	6.1%	42.4%
female	46.0%	18.0%	36.0%

In Yongxing and Dachang, 58.8% of the females interviewed think marital coercive sex as a problem is “not illegal”. 60.5% of the females prefer the non-legal solutions to this problem. In Shenxian and Pengzhuang, 64.7% of the females interviewed consider marital coercive sex as “not illegal” and 64% of the females prefer the non-legal solutions to this problem. According to the data, in the current society, when marital coercive sex occurs, more than half of the possible victims would likely to choose some non-legal rather than legal remedies.

(3) Circumventing the Law: Tolerance

Now I will investigate the memetic influences upon the wives who do consider marital rape is a problem of law and are ready to seek legal solutions. This third type of meme contributing to the failure of current marital rape law can be observed from Question 7 in the questionnaire about people’s attitudes towards the wives who charge their husbands of rape.

In Yongxing and Dachang, 17.6% of the people interviewed think she is absurd and another 11.2% sympathize the husband, the sum of which makes up to nearly 30%. Correspondingly, in Shenxian and Pengzhuang, the percentage is as high as $17.2\% + 27.6\% = 44.8\%$. People who take one of the two choices tend to be unfriendly to those victims of marital rape who pursue legal remedies. Thus, the above percentages mean an unfriendly social environment to such victims, and this unfriendly environment also contribute to the failure of current Chinese marital rape law.

By adopting the memetic approach, we can consider the operation of marital rape law from an individual, rather than a general, perspective. We therefore have the chance to put ourselves into the position of the individual victim. Seeking a legal solution is seeking legal protections. Naturally she would think about what she could get from law and what it costs her. Legal remedy for marital rape is supposed to punish the offender, giving protection to the victim. But it has some side effects under traditional memes observed in Question 7.

As discussed in the previous chapter, under such traditional memes, the victim will pay extra cost if she chooses legal remedy. This means the temporary compensation by official marital rape law would probably be cancelled out by a greater harm in the future. All of these are because, when using the official law, the woman has broken the “folk law”, which is in fact the traditional memes.

So, even if the current marital rape law is effectively enforced in judicial practice, it does not necessarily guarantee the achievement of marital law’s purpose to protect the victims. The disjunction between the law and the traditional memes raises the cost of legal remedy and makes the law fall short of the promised protection. Not being able to offer the protection expected by the victims is one failure of the marital

rape law. And the extra costs of legal actions may even keep some of the victims who hope to seek for legal protections from really doing so. They will eventually choose the option of tolerance. This is another failure of marital rape law.

However, all the costs or failures are not from the law itself but from the unfavourable memetic environment, in which the modern marital rape law operates. Given a more suitable memetic environment, where people would not consider the charge of marital rape as something unacceptable, the antagonism of the community would not exist. Without antagonism, extra costs for legal remedy would also disappear.

To overcome this third cause of the failure of marital rape law, therefore, it is far from enough for legislative memes to just take over the mind of the judges. As this failure results from unfavourable memes spread out in the society, only when the legislative memes have taken over the mind of most individuals, can modern marital rape law provide better protection to the victims.

The case of law circumvention by tolerance also has its explanation from the perspective of the problem of life. In this case, the victim does have the subjective meaning to attach to the natural action of marital coercive sex to constitute a legal problem of marital rape. However, she also realizes that people around her have different understandings of the action of marital coercive sex. She also realizes the negative reactions this different understanding will elicit from the people around if she activates a legal action for the marital coercive sex. Naturally she can be clearly aware of the harms these reactions would cause to her. Consequently, another problem of life to the victim is constituted by the reaction of the people around together with the victim's subjective awareness of the reaction's being harmful.

Then the victim has two problems of life which are related to each other. The first problem of life is based on the action of marital coercive sex while the second problem of life is activated by her action of making the first problem of life a problem of law. Often under the traditional ethical circumstances, the victim has the subjective feelings of greater pain in the second than the first problem of life.³⁹⁴ In order to avoid the greater pain, it would be quite understandable for her to eliminate the activation of the second problem of life, which is to seek legal remedy for the first problem of life. As a result she would choose to tolerate the relatively smaller pain in the first problem of life.

4. Conclusions

Though the law are the individual memes of the lawmakers, it should be the memes that the lawmakers get from those contained in the problems of life not those got directly from books or high-class notions and theories. Unfortunately, the legislative background shows that the current Chinese marital rape law is the latter.

Empirical data shows that, in the minds of the people, there are no sufficient new memes to attach the meaning to the actions of marital coercive sex to constitute the crime of rape. Traditional memes with their remaining power prevent the constitution of marital rape as a problem of law to the people in general.

Judges, standing between the legislation and the realistic life, have both the opposing memes in mind. They are presently the crucial targets for both of the memes to win in the battle.

³⁹⁴ See Suli, *The Rule of Law and its Local Resources*, China Politics and Law Press, 1996, p23.

3.3.3 Further analysis: spread of the memes

The above analyses have shown significance of memes to the effective operation of marital rape law. So we will carry on with further analysis about the spread of memes to find out what is the most efficient way to develop the favourable memetic environment for the marital rape law.

According to the answers to Question 11, different carriers have different powers in spreading the memes of marital rape. Judges and lawyers are taken by 70% to over 80% people in both the cities and the rural areas as the most trustworthy people for their opinions about marital rape problem. This shows the judges and lawyers with their authority in people's eyes can grant the memes of marital rape special power to win the victory over the traditional memes. Accordingly, the explicit criminalization of marital rape in the cases settled in the courts will be efficient in making the people accept the concept of marital rape.

Statistics of Question 12 shows that there are always over half of the people in rural area who have never heard of the term "marital rape" (50.3% in Yongxing and Dachang, 56.3% in Shenxian and Pengzhuang). In the cities there percentages are much lower (19.4% in Qingdao). This conforms to the contrast in the attitudes towards to marital rape law in the rural and urban areas. If one has no chance to get in contact with a meme, naturally, it is impossible for him/her to accept the meme. Therefore, more chance to get in contact with the memes of marital rape seems another means of spreading them.

Specifically, more writings or discussions about the topic of marital rape in public media, like newspapers and magazines, television and the Internet, will be helpful. Especially if judges and lawyers express in the writings and discussions their opinions for the criminalization of marital rape, with their authority, it will further improve the efficiency.

3.3.4 Conclusions

After all the analysis, I can now draw the conclusions obtained by the memetic approach about marital rape law problem in China.

1. Different description of the cultural environment

For the cultural environment of the marital rape law, the memetic approach draws attention to the existing dominance in people's mind of the memes decriminalizing marital rape especially in the rural areas. However, the memetic approach also notices the difference between the cities and the countryside: the dominance of memes decriminalizing marital rape is remarkable in the rural areas while in the cities the dominance is less evident and the memes criminalizing marital rape are about to win over.

The memetic approach has also noticed that the existing dominance of the memes decriminalizing marital rape is not absolute and unchangeable but is right in the process of changing. And the establishment of the dominance of the legislative memes that criminalize marital rape is not quite difficult if appropriate measures are taken.

Even in the rural areas, many people are against the actions of marital rape and support legal solutions of such problems. Though most people are not currently regarding actions of marital coercive sex as the crime of rape, however, they are quite ready to accept the new explanations from the legal authorities. And all these provide fertile soil and a promising future for the acceptance of the memes criminalizing marital rape. The memetic approach therefore finds a much more favourable cultural

environment for marital rape law than that claimed by the opponents of the criminalization of marital rape with the general culture approach.

2 Memetic proposals to legal practice

The memetic approach also gives to legal practices different advices from those by the general culture approach.

(1) Legislation

To the legislators, the memetic approach will advise that special legislation for marital rape is not necessary. There are two reasons for the advice.

First, the existing provisions already criminalize marital rape. Any special legislation is just superfluous repetitions.

Secondly, people supporting the special legislation for marital rape claim that it will help with the problem of the ineffectiveness of the current marital rape law; but this is not true. The above memetic analyses ought to have shown us that the causes for the ineffectiveness of current marital rape law lie not in the statutory law but in the cultural environment in which the law operates. Without changes of the cultural environment, special legislation for marital rape means nothing but some more wastepaper in wastebasket.

(2) Judicial Practice

To the judges, the memetic approach suggests that they should follow the principle of criminalization, rather than decriminalization, of marital rape. There are three reasons for the suggestion.

First, the criminalization of marital rape is consistent with the legislation. In any normal codified legal system, judges ought to follow the code. Yet at present in China, in terms of marital rape law, inconsistency between legislation and judicial practices has been occurring in most of the cases. And this inconsistency is reprehensible and should be eliminated.

Secondly, the reason for the courts deciding to adhere to the principle of "no rape in marriage" is not valid. Why "no rape in marriage" is adhered to as a principle in judicial practice, according to the Supreme Court, is because the traditional memes decriminalizing marital rape remain absolutely dominant in current society. The courts worry that the criminalization of marital rape cannot be accepted by society and thus will arouse strong negative reactions.

However, the empirical studies above have shown cultural environment for marital rape law is not as antagonistic as anticipated. Even in the conservative rural areas, though traditional memes are indeed enjoying dominance in people's minds, there are already a number of people who have accepted the concept of marital rape. Besides, if the courts make decisions in favour of the criminalization of marital rape, most of the people with traditional memes are also ready to accept the different new memes from the legal authorities. All theses mean that the worries of the judges, which lead to the adherence of marital exemption of rape, are not necessary.

Finally, if the courts start to criminalize marital rape in practice, it will be an extremely great help to the further spread of the legislative memes. As previously said, instead of fierce resistance, the memes criminalizing marital rape delivered from the courts will be much more easily accepted by people. With the acceptance of the people around, more people will feel easier to accept the legislative memes and the whole memetic environment will change, more quickly, to adapt to the effective operation of marital rape law.

How, then, to make the judges follow the memes of the criminalization of marital rape? Judicial commentary seems to be helpful tool. In China, the Supreme Court, and the Supreme Procuratorate as well, has the power to give commentaries or interpretations on the specific legal problem in judicial practices, to give interpretations on legal provisions, to answer the questions raised by local courts. These commentaries and interpretations are usually called judicial commentaries or interpretations, which have the binding force of law.³⁹⁵ Judicial commentary has been proved to be an active and efficient role in making up for the insufficiency of the legislation and unifying the judicial activities. In judicial practice in China today, judicial interpretation response to problem in practices promptly, guiding the judges in their judicial activities.³⁹⁶ With the advantages, judicial commentary can be an efficient tool to convert the judges to the criminalization of marital rape.

The judicial interpretation could be made as follows:

1. Clarify that, according to the Criminal Law, the subject of the crime of rape are general subjects, making clear that, as a principle, a husband can be the subject of the crime of rape against his wife.
2. Make clear that "no trial without complaint" principle is applied in a marital rape case and the wife can withdraw her complaint within a certain period of time.

The second point of interpretation aims to provide better protection to the victims of marital rape, which is also the purpose of marital rape law *per se*. Empirical data has shown there are still traditional ethical elements in the current Chinese society, which decide, as a matter of fact, that legal actions are not always the best way for the victims of marital rape to protect themselves. With the second point, the law gives the victims the chance to seek what they think by their own judgment is the best protection.

Such a proposal, is more flexible than the partial criminalization of marital rape, which criminalizes the marital rape only under fixed circumstances of separation, divorce proceeding or null marriage. It is true that, as the collected cases have shown, marriages involved in most of marital rape cases are not in the normal subsisting state. But such rigid prescriptions cannot protect the victims in the possible cases with legally normal marriage state. With its flexibility, the memetic proposal can expand the range of legal protection to the victims of marital rape that occurs when the involved marriage has no legal flaws.

Another reason why the memetic proposal is better than the rigid partial criminalization lies in its ability to maintain a rigorous definition of the concept of rape. By criminalizing marital rape under some special circumstances, the consistency of the concept of rape in general has actually been damaged. It becomes uncertain when an action is rape and when it is not. Thus, logically speaking, we would no longer be able to define the general concept of rape with the lack of consent. The memetic proposal does not have this problem. It does not need to change the substantial concept of rape because what it proposes is procedural. So the memetic proposal is much better at maintaining the logical consistency of the general concept of rape.

Also, when the cultural environment in China has changed to be appropriate for the complete criminalization of marital rape, the rigid conditional criminalization prescribed will have to be changed again so as to cover the marital rape cases in

³⁹⁵ Zhang Zhiming, "Study of Legal Interpretation Problems in Contemporary China", Problems of Legal Interpretation, edited by Liang Zhiping, Law Press, 1998, p220.

³⁹⁶ Ibid.

normal marriage and bring marital rape back to the standard concept of rape in general.

In contrast, the memetic proposal will deal with the change of cultural environment in a different way. The law is not the only constraint to regulate human behaviours in the world. Human behaviours are also regulated by the constraint of nature, which requires that one do certain things whether one wants to or not; the constraints of nature that demand, for example, that when one steps off a cliff, he will fall.³⁹⁷

With the case of marital rape, we can also see the constraint of nature. Memes are also beings of the nature. Prior to legal constraints, many human actions are already regulated by the constraints of memes. Why do most marital rape cases involve abnormal marriages? This is because for husbands and wives in marriages that are usually thought to be normal and stable, when marital rape occurs, the wives generally will not complain. Wives might have different reasoning for not complaining: it might be the love for husbands, which makes them rather tolerate; it might also be the ethical memes in mind that they should not complain even if they personally do not like it. Whatever the reasons might be, it is certain memes in her mind that stop her from complaining. And we could see it as constrain of nature as long as we see memes as beings of nature. Similarly, when the cultural environment has changed, there will be no more memes to make the victims retract their complaints and the second point of the proposal in the judicial interpretation will automatically stop being enforced. This is also the constraint of nature.

The constraint of nature makes even clearer the fallacy of an argument of the people against the criminalization of marital rape. With the general culture approach, the opponents assume that traditional family ethics are dominating the current society. And the traditional ethics highly value the stability and harmony of marriage. They then go on to argue that if marital rape is criminalized, wives can accuse their husband of rape for a common action of coercive sex. This will inevitably cause the instability of marriage and will therefore be unacceptable by the society dominated with traditional values of stable marriages.

Such an argument is obviously illogical. If the current society is really dominated by the traditional ethics as claimed, then people in the society will have the memes that do not attach a problematic meaning to the marital coercive sex. And with the constraint of nature, wives will therefore not complain. So even if the criminalization of marital rape is introduced in the statutes, it will be ineffective and the normal marriages will accordingly not be affected.

If normal marriages are really damaged or introduced by the criminalization of marital rape, then it means that wives will complain about their husbands' coercive sex. This means that people are not necessarily dominated with the memes of the traditional ethics. And this is against the premise of the above argument. So, in either way of reasoning, such an argument is always in the dilemma of self-contradiction.

Conclusively, this constraint of nature tells us it is not necessary for the opponents to worry about that the criminalization of marital rape, if applied in current China, will damage the stable and normal marriages.

³⁹⁷ Lawrence Lessig, *Constitution and Code*, p2, Cordell Hull Speakers Forum.

Chapter 4 Marital Rape in the UK --- a supporting case

It is now widely agreed in the western world that marital rape is a crime. But, for quite a long period of time in history, criminal laws in the west generally excluded marital coercive sex from the crime of rape, like the 1871 Federal Germany Criminal Code,³⁹⁸ the US Model Penal Code,³⁹⁹ and other western laws.⁴⁰⁰

Modern law, however, takes a different approach. Art. 177 of the 1998 German Criminal Code abolished the “extramarital” character of rape and therefore recognized marital rape as a crime.⁴⁰¹ In the American case *Mario Liberta* in 1984, Judge Wachtler from Court of Appeals of New York said: “To ever imply consent to such an act is irrational and absurd. Other than in the context of rape statutes, marriage has never been viewed as giving a husband the right to coerced intercourse on demand. Certainly, then, a marriage license should not be viewed as a license for a husband to forcibly rape his wife with impunity. A married woman has the same right to control her own body as does an unmarried woman”⁴⁰². On July 5th 1993, North Carolina became the last state in the US to abolish the exemption of marital rape.

If we look back at the historical backgrounds and the social conditions at the time when the problem of marital rape arose, we will see more than a pure legal problem but an obvious cultural element in it. In this chapter, we will focus mainly on England and Scotland as examples for rather detailed study to see whether the memetic approach I developed for China is suitable for these UK jurisdictions, which are a very different culture. If successful, it means that my proposed approach has the capacity to surmount the cultural differences and be applied in different legal systems. This would be of great help to the construction of Chinese marital rape law when using western laws for reference and would also offer a probable methodological improvement for culture and law studies in general.

³⁹⁸ “Article 177 Rape: 1. Anybody who by force or threat of immediate bodily harm forces a woman to submit to extra-marital sexual intercourse or who misuses a woman for extra-marital sexual intercourse ...” *The German Penal Code of 1871*, trans. Gerhard O. W. Mueller and Thomas Buergethal, Sweet & Maxwell Limited, London, 1961, p103.

³⁹⁹ “§ 213.1. Rape and Related Offenses.

(1) Rape. A male who has sexual intercourse with a female *not his wife* is guilty of rape if:

(a) he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or ...” *Model Penal Code*. <http://uk.westlaw.com/>

⁴⁰⁰ For example, The Austrian Penal Act (1852 and 1945 as amended to 1965): “Section 125. He who by dangerous threats, actually exercised violence or by fraudulently induced stupor, renders a female unable to resist him and misuses her while in this condition for *extramarital* intercourse commits the felony of rape.” Trans. Emeritus Norbert D. West and Samuel I. Shuman, Sweet & Maxwell Limited, London, 1966, p63.

⁴⁰¹ *German Penal Code*, (Chinese Version), China Legality Press, 1999, p69.

⁴⁰² *People v. Liberta*, 64 N.Y.2d 152 (1984).

4.1 Marital rape in the UK

4.1.1 Brief Legal history of marital rape in the UK

Traditionally in England, there was a marital exemption of rape. In 1763, the English jurist, Lord Hale wrote: "[T]he husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract"⁴⁰³. This point of view had been accepted by most, though not all, judges in England as a basic principle, according to which a husband had the right to force his wife to have sex with him without committing the crime of rape. The Parliament also perpetuated this marital exemption of rape.

Section 1 of the "Sexual Offences Act 1956" provided:

"(1) It is felony for a man to rape a woman.

*(2) A man who induces a married woman to have sexual intercourse with him by impersonating her husband commits rape."*⁴⁰⁴

Sexual Offences (Amendment) Act 1976, s.1 gave a more explicit definition of rape:

"1. ---(1) For the purpose of section 1 of the Sexual Offences Act 1956 (which relates to rape) a man commits rape if:

*a) he has **unlawful** sexual intercourse with a woman who at the time of the intercourse does not consent to it; and*

*b) at that time he knows that she does not consent to the intercourse or is reckless as to whether she consents to it."*⁴⁰⁵

According to this definition, the *unlawfulness* of the sexual intercourse is essential to the crime of rape. And the word "unlawful" here, under the old common law interpretation, is understood as "extramarital", with which, correspondingly, the crime of rape referring only to the sexual intercourse outside marriage. Therefore, the Act allowed the marital exemption for rape.

However, though the marital exemption of rape in the statutory law seems to stay stable and unchanged, case law, on the other hand, has evolved. Hale's golden rule, according to Owen J., has been eroded by custom throughout the passage of time.⁴⁰⁶ As early as 1888, it has been doubted in *R. V. Clarence*⁴⁰⁷ by some of the judges hearing the case.⁴⁰⁸ The year of 1949 saw the first recorded prosecution of a husband for the rape of his wife.⁴⁰⁹ In this *R. v Clarke* case, a separation order had been made before the actions of the defendant. The order contained a provision that the wife was no longer bound to cohabit with her husband. Byrne J. held that such a separation order had the effect of revoking the consent which the wife, by process of law, namely, by marriage, had given to the husband to exercise the marital right during

⁴⁰³ Hale, *History of Pleas of the Crown*, vol. 1, ch. 58, 1736, p629.

⁴⁰⁴ *Current Law Statutes*, General Editor John Burke, Sweet & Maxwell, Stevens & Sons, W. Green & Son, 1956, 69/1.

⁴⁰⁵ *'Current Law' Statutes*, Sweet & Maxwell, Stevens & Sons, W. Green & Son, 1976, 82/1.

⁴⁰⁶ *R v. R* [1991] 3 WLR 770.

⁴⁰⁷ *R. v. Clarence* (1888) 22 Q. B. D. 23, C. C. R.

⁴⁰⁸ *R v. R* [1991] 3 WLR 772.

⁴⁰⁹ *R. v. Clarke* [1949] 2 All E. R. 448; 33 Cr. App. R. 216, C.C.A.

such time as the ordinary relations created by the marriage subsist between them. This might be seen as the beginning of the erosion on the marital exemption of rape by finding certain circumstances in which wife can revoke her consent that used to be thought irrevocable.

In *R. v. Miller*⁴¹⁰, there was no separation order on which a revocation of consent could be based. Lynskey J. affirmed the existence of the exemption and the husband was acquitted of raping his wife. However, this case, as well as a number of other cases, can be seen as already limiting the ambit of the exemption by examining when the implied consent is revoked.⁴¹¹ Later, in *R. v. Steele*⁴¹² the Court of Appeal held that, other than by court order, revocation could also be express agreement between the parties. In 1990, Owen J. at Leicester Crown Court added, besides the express agreement between the parties, further circumstances in which consent could be revoked. This is either by an implied agreement between the parties or by a unilateral withdrawal from co-habitation with a clear indication that consent had been revoked.⁴¹³

Clearly there has been here a gradual whittling away of the exemption. Eventually in *R. v. C.*⁴¹⁴ 1990, Simon Brown J. followed the Scottish case of *Stallard v. H. M. Advocate*⁴¹⁵ and decided the marital exemption no longer exists: "In my judgment, the position in law today, as already declared in Scotland, that there is no marital exemption to the law of rape".⁴¹⁶

In this referred Scottish case, which took the lead in recognizing marital rape, David Johnston Stallard was charged with rape of his wife while the couple were still living together. At trial, the judge rejected a preliminary submission by the defence that, by the law of Scotland, a husband was not amenable to a charge of rape of his wife while they were still cohabiting. The accused accordingly appealed to the High Court on this preliminary issue. The High Court dismissed the appeal and rejected the suggestion that they were creating any new crime. The Lord Justice General said: "Rape has always been essentially a crime of violence and indeed no more than an aggravated assault". The law of Scotland already protected a wife from assault by her husband where that assault was accompanied by "gross indecencies".⁴¹⁷

Finally, the explicit abolition of marital exemption of rape in England occurred in 1992, marked by the decision of case *R v. R*. The defendant in the case married his wife in 1984. As a result of matrimonial difficulties the wife left the matrimonial home in 1989 and returned to live with her parents, informing the defendant of her intention to petition for divorce. The defendant also communicated to the wife his intention to "see about a divorce." While the wife was staying at her parents' house, the defendant forced his way in and attempted to have sexual intercourse with her, in the course of which he assaulted her. He was charged on indictment with rape and assault occasioning actual bodily harm. The judge rejected his submission that by virtue of section 1(1) of the Sexual Offences (Amendment) Act 1976, the offence of rape was one which was not known to the law where the defendant was the husband of the alleged victim. He thereupon pleaded guilty to attempted rape and assault occasioning actual bodily harm and was convicted. On the defendant's appeal against

⁴¹⁰ *R. v. Miller* [1954] 2 Q. B. 282.

⁴¹¹ *R. v. Miller* [1954] 2 Q. B. 282; [1954] 2 W. L. R. 138; [1954] 2 All E. R. 529.

⁴¹² *R. v. Steele* (1976) 65 Cr. App.R. 22

⁴¹³ *R v. R* [1991] 3 WLR 767.

⁴¹⁴ *R. v. C* (1990) 140 N. L. J. 1497

⁴¹⁵ *S. v. H. M. Advocate*, 1989, S. L. T. 469.

⁴¹⁶ *S. v. H. M. Advocate*, New Law Journal, 1990, vol.140, p1498.

⁴¹⁷ *S. v. H. M. Advocate*, 1989, S. L. T. 469.

his conviction of attempted rape, the Court of Appeal (Criminal Division) dismissed the appeal, for that the marital exemption of rape "no longer even remotely represents what is the true position of a wife in present-day society".⁴¹⁸

On October 13, 1991, the House of Lord considered the judgment of the Court of Appeal and held that there was no longer a rule of law that a wife was deemed to have consented irrevocably to sexual intercourse with her husband; and that, therefore, a husband could be convicted of the rape or attempted rape of his wife where she had withdrawn her consent to sexual intercourse; that section 1(1) of the Sexual Offences (Amendment) Act 1976 did not give statutory recognition to and perpetuate the former rule; and that, accordingly, the defendant's conviction would be upheld.⁴¹⁹ In considering the case, Lord Keith concluded that the word "unlawful" in section 1(1) of the Act of 1976 is mere surplusage and should be ignored.⁴²⁰

Following the decision of the House of Lords the case was taken to the European Court of Human Rights under *Article 7* of the *European Convention on Human Rights*.⁴²¹ But the ECHR finally concluded that "there was no reason to disagree with the national courts' conclusion that marital rape was not excluded from the definition of rape in s.1 of the 1976 Act as the term "unlawful" contained therein was superfluous. The national courts' decisions did not violate Art.7 as they continued a perceptible evolution of case law, which had reached the stage, at the date of the applicants' actions, where they (husbands) could have been found guilty of rape (against their wives)".⁴²²

The *R. v. R.* case was of historical significance. Because of the case, the English Law Commission began to study the legal problems about marital rape and a report was published in 1990 suggesting the complete abolition of the notion of marital consent and the marital exemption for rape.⁴²³

"... there are no valid reasons for distinguishing between non-consensual sexual intercourse within marriage on the one hand; and, on the other hand, non-consensual sexual intercourse between parties who are not married, or who are married but are subject to one of the circumstances that at present bring such conduct within the crime of rape."⁴²⁴ Thus, "The Commission's provisional conclusion, on which it seeks comment, is therefore that the present marital immunity in rape should be abolished in all cases."⁴²⁵

In *R. v. R.* Lord Keith also suggested:

"... one of the most important changes is that marriage is in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband. Hale's proposition involves that by marriage a wife

⁴¹⁸ *R. v. R.* [1991] 2 All E. R. 257.

⁴¹⁹ *R v. R* [1991] 3 WLR 767.

⁴²⁰ *R v. R* [1991] 3 WLR 776.

⁴²¹ "Article 7 (1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. (2) This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations". *European Convention on Human Rights, Collected Texts*, 7th Edition, Strasbourg, January 1971, p5.

⁴²² (1996) 21 E.H.R.R. 363, *SW v. United Kingdom*, Before the European Court of Human Rights, 22 November 1995.

⁴²³ The Law Commission(1990), *Rape Within Marriage*, Working Paper No. 116.

⁴²⁴ *Ibid.* 5.1, p83

⁴²⁵ *Ibid.* 5.2, p83.

gives her irrevocable consent to sexual intercourse with her husband under all circumstances and irrespective of the state of her health or how she happens to be feeling at the time. *In modern times any reasonable person must regard that conception as quite unacceptable.*⁴²⁶

And the support of the case *R v. R* verdict by the European Court of Human Rights brought a thorough change to the social attitude towards marital rape in England or even the whole western society. In the new definition of rape in 1956 Act Amendment, the word "unlawful" was deleted and therefore approved the conclusion of *R v. R*. Criminal Justice and Public Order Act 1994 Chapter 33 s 142 Rape of women and men provides:

"For section 1 of the Sexual Offences Act 1956 (rape of a woman) there shall be substituted the following section--

"1.-- Rape of woman or man.

(1) It is an offence for a man to rape a woman or another man.

(2) A man commits rape if--

(a) he has sexual intercourse with a person (whether vaginal or anal) who at the time of the intercourse does not consent to it; and

*(b) at the time he knows that the person does not consent to the intercourse or is reckless as to whether that person consents to it."*⁴²⁷

Sexual Offences Act 2003 provides:

"1. Rape

(1) A person (A) commits an offence if ---

(a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,

(b) B does not consent to the penetration, and

*(c) A does not reasonably believe that B consents."*⁴²⁸

4.1.2 Cultural elements behind

1 Individual memes as the decisive role

When people talk about the English marital exemption of rape, Lord Hale's well-known remarks are always quoted as the source of its legal validity. However, Lord Hale merely stated his opinion but gave no further or more fundamental legal authority to explain why, "by their mutual matrimonial consent and contract", the wife "hath given up herself in this kind unto her husband" and she cannot retract the consent given.

As Lord Hale cited no sound legal authority for his statement, what, then, gave his statement the legal validity and made it such a widely applied legal principle?

"It has been widely asserted that Sir Matthew Hale was the first English lawyer to hold that a husband who has sexual intercourse with his wife by force cannot be convicted of rape. He may have been the first text writer to mention the point, but we may doubt whether he were the first to hold this opinion, for in medieval England, as elsewhere in Europe, the obligations of matrimony were governed by the law of the church". So the principle he stated in his *History of the Pleas of the Crown* "would

⁴²⁶ *R v. R* [1991] 3 WLR 770.

⁴²⁷ *Criminal Justice and Public Order Act 1994*, Current Law Statutes, Sweet & Maxwell, W Green, c 33, 33/142.

⁴²⁸ *Sexual Offences Act 2003*, Current Law Statutes, Sweet & Maxwell, W. Green, c 42, 42/1.

hardly have seemed novel to a contemporary ecclesiastical lawyer, and we may doubt whether it would have seemed novel to a common lawyer. It is improbable, at least, that he invented it from simple misogyny".⁴²⁹

From these long quotations, we see that Lord Hale was confident with the validity of his statement because it was already a common belief at his time which was easily derived from the even more common belief of people in the society at the time, the religious belief of women's affiliated status to men in marriage. As a person believes a belief, the belief is certainly valid to him. And the necessary derivations from the belief are accordingly also valid to him. Therefore, Lord Hale's statement as a valid legal principle got its validity from the beliefs of people, or from the memes of the individuals in the society at the time.

The obligations of matrimony at the time, as Barton observes, were governed by the law of the church. It should be reasonable to infer the close connection between the common memes of women's affiliated status in marriage and the religion of Christianity, given the fact that Christianity at Lord Hale's time was widely accepted in English society.⁴³⁰ "Importantly, the existence of any spousal exemption indicates an acceptance of the archaic understanding that wives are the property of their husbands and the marriage contract is an entitlement to sex."⁴³¹ The understanding that wives are the property of their husbands may sound archaic today but it once was the most undoubted truth in people's mind. "... , she shall be called Woman, because she was taken out of Man."⁴³² Woman is derived from man because she is just a rib of man. Was anything more authoritative than the Bible at that time in the Christian cultures? It was superior to any authority that could be cited from any legal literature because the Bible worked as the cornerstone of the memes of the whole society and the whole civilization, in which legal ideas were just a minor part.

Therefore, behind the same marital rape exemption principle of western jurisdictions, like England, is the sound social memetic foundation to support the marital exemption for rape: the idea of women's affiliated status, which was greatly consolidated by Christian religion and turned out to be a part of western tradition which had enjoyed thousands of years history and which remained dominant until recently.

Lord Hale did not have to worry that he had no authority to cite; the common sense, the well-accepted idea of women's subservient status, was the best authority that Lord Hale had. Though the authority is not a legal one, it was this authority that gave Lord Hale's notion of marital rape exemption the self-evident status as the mathematical axiom has.

Clearly the marital exemption of rape as a legal principle in the past in England established itself on the ground of the individual memes in the society at the time. What about the current legal principle of the criminalization of marital rape? Can we also find the role of the non-legal memes of the current human individuals in establishing the current legal principle? I will try to find the answer from the reasons given by the judges for the criminalization of marital rape.

⁴²⁹ J. L. Barton, "The Story of Marital Rape", Law Quarterly Review, 1992, 108(Apr), 261-262.

⁴³⁰ However, it is important to notice, as I will demonstrate later, that Lord Hale's statement as a valid legal principle was not derived directly from the book of the Bible but from the realistic beliefs people held in their mind in the real life. Only after the Biblical notions of Christianity had already become the realistic memes in human mind, did they have the power to grant the validity to Lord Hale's statement as a legal principle.

⁴³¹ Raquel Kennedy Bergen, *Marital Rape*, March 1999.

<http://www.vaw.umn.edu/documents/vawnet/mrape/mrape.html#russell1990>

⁴³² Chapter2-23, Genesis, from *The Holy Bible*, Revised Standard version.

On the appeal by the defendant of the case *R. v. R.*, the court held that “there was no longer a rule of law that a wife was deemed to have consented irrevocably to sexual intercourse with her husband”. With the phrase “no longer”, the court actually admitted two things. First they admitted that the rule used to exist in the past, which means the admission of the validity of marital exemption of at Lord Hale’s time. Secondly, they admitted there was a change to the rules concerning the problem of marital rape, which invalidated Lord Hale’s principle of marital exemption of rape and validates the current approach of the criminalization of marital rape. As the European Court of Human Rights has stated, a perceptible evolution of case law “had reached the stage, at the dates of the applicants’ actions, where they could have been found guilty of rape”.⁴³³

But why? How has the case law about marital rape so evolved? According to Lord Keith, the reason for the legal change lies in the more general changes in people’s ideas about marriage and women’s status: “one of the most important changes is that marriage is in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband”. That is, obviously, the change of marital rape law has resulted from the change in people’s memes about marriage in general. In Hale’s time, people generally agreed that by marriage a wife gives her irrevocable consent to sexual intercourse with her husband under all circumstances. Today, however, people would find such a conception totally “unacceptable”.⁴³⁴ Instead, modern people generally take husbands and wives as equal partners, each of which enjoy their own independent rights and personalities. Such a change in memes about marriage is substantial and dramatic, and it is this change that caused the changes in law establishing the current criminalization of marital rape.

The number of people holding the modern memes about marriage and the status of women are not few. As Lord Keith said, “In modern times any reasonable person must regard that conception as quite unacceptable”⁴³⁵ “Any reasonable person” literally refers to most, if not all, people in society. Therefore, it is the wide-acceptance by most individuals in modern English society of the non-legal memes of the equal status and rights of women in marriage that establishes the legal principle of the criminalization of marital rape.

Conclusively, for both marital exemption of rape and the criminalization of marital rape in England, what plays the decisive role behind are always certain wide spread memes in the society, which work as the general meme-complexes to derive the specific memes of marital rape or marital exemption of rape on the concrete problem of life.

We can see in the Scottish cases the same activator to drive the change from the exemption to the criminalization of marital rape. In the early 1800s, Baron Hume stated in his *Commentaries* that a husband “cannot himself commit a rape on his wife, who has surrendered her person to him in that sort”.⁴³⁶ The statement was followed by the judges till the very recent cases.⁴³⁷

⁴³³ *R v. R* [1991] 3 WLR 767.

⁴³⁴ *R v. R* [1991] 3 WLR 770. Also: “... the abandonment of the *unacceptable* idea of a marital exemption from rape conformed with a civilized concept of marriage and with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom.” See: *SW v. United Kingdom, CR v. United Kingdom*, 21 E.H.R.R.363, p402.

⁴³⁵ *R v. R* [1991] 3 WLR 767

⁴³⁶ Hume D., *Commentaries on the Law of Scotland, Respecting Crimes*, vol. 1, The Law Society of Scotland, 1986, p306.

⁴³⁷ See *H.M. Advocate v. Duffy*, 1983 S. L. T., 7; *H.M. Advocate v. Paxton*, 1985, S. L. T. 96;

Advocate v. Duffy in 1982 is the first attempt in Scotland that a husband was indicted for the rape of his wife.⁴³⁸ In the case the accused and the complainer were husband and wife but they were living apart at the time of the alleged action. The court held that "The common law must take contemporary attitudes and mores into account", finding that in modern times it is quite illogical and unreasonable to think that a husband cannot rape his wife.⁴³⁹ However, instead of explicitly challenge the authority of Baron Hume, the court recognized his authority but held that Hume must have been dealing with the situation where husband and wife were living together, not the situation where they were living apart.⁴⁴⁰ Similarly, in *Advocate v. Paxton* in 1984, the involved parties were also living separately, but the separation had lasted only a matter of weeks and the parties still met regularly for social outings.⁴⁴¹ The court again recognized that a man cannot be guilty of raping his wife "who has surrendered here person to him that sort", but held where it is admitted that the parties are de facto separated, not living at bed and board and the wife has withdrawn herself from the society of her husband then she could not be said to have "surrendered her person" and the ordinary law of rape would apply.⁴⁴²

But in the Scottish case of *Stallard* in 1989, judges explicitly claimed that they were no longer bound by Baron Hume's statements about husbands' immunity. The court took as the activations of the change also the social change in the ideas about women's status in family.

The reason given for the husband's supposed immunity in 18th and early 19th century, said the court, was, according to Hume, because the wife had "surrender her person" to her husband "in that sort".⁴⁴³ By the second half of the 20th century, however, according to the court, the status of women and the status of a married woman have changed dramatically. A husband and wife are now for all practical purposes "equal partners".⁴⁴⁴ Thus, it could not still be seriously maintained that by marriage a wife consents irrevocably to intercourse in all circumstances, including intercourses obtained by force. "Any such consent is revocable, and revocation is a *question of fact* in all the circumstances, not a matter of legal fiction".⁴⁴⁵ Therefore, it is the factual non-legal memes about women's status in family that exploited the validity of the exemption principle, promoting the evolution of rape law from the complete exemption, through the partial criminalization, to the complete criminalization of marital rape today.

Along with the gradual changes of case law, we can see a vivid picture of memetic struggle behind: the new memes of women's rights grow stronger, prevailing over the old ethical memes. The balance of power between the two groups of memes decides the course of the development of marital rape law. So here is something identical to what we have seen in China: non-legal memes working as the social foundation for the actual operation of marital rape law in all the three stages of exemption, transition and criminalization.

2 Influence-exerting mechanism: the problem of life

⁴³⁸ *M. Advocate v. Duffy*, 1983 S. L. T., 8;

⁴³⁹ *Ibid.* 8-9.

⁴⁴⁰ *Ibid.* 9.

⁴⁴¹ *H.M. Advocate v. Paxton*, 1985, S. L. T. 96.

⁴⁴² *H.M. Advocate v. Paxton*, 1985, S. L. T. 96.

⁴⁴³ *S. v. H. M. Advocate*, 1989, S. L. T. 469

⁴⁴⁴ *Ibid.*

⁴⁴⁵ Ian Brownlee, "Marital Rape---Lessons from Scotland", *New Law Journal*, September, 1989, p1276.

But, how do these non-legal memes manage to infiltrate into the realm of law? What mechanism lies there in between for the memetic infiltration?

In Lord Hale's England and Baron Hume's Scotland, the common memes in the society took marriage as the mark of the irrevocable consent wives gave to husbands. Therefore, when marital coercive sex occurred, people at that time did not see it as the same as the coercive sex between men and women with no marital relationships, which was generally defined as rape. So, at the sociological level, marital coercive sex as was not perceived at the time to be the problem of rape. Since the problem of rape did not exist here, there would of course have been no law necessary to remedy the problem.

Here we see a same influence-exerting mechanism as that we found in China. The same natural actions of marital coercive sex, as those in China, also existed in England at Hale's time and Scotland at Hume's time. However, the common memes at the time attached to such actions the meaning that was different from what was attached to the actions of rape. Accordingly, with the lack of the constituent of the subjective meaning, marital rape as a problem of life could not have been constituted. Without the problem of life, as Zweigert and Kötz say, correspondingly, there would be no such a problem of law. That is, marital rape at the time was not at all a legal problem and surely there would have been no marital rape law either.

Modern notions of seeing husbands and wives as equal and independent persons see no differences between the marital coercive sex and coercive sex between men and women without marital relations. Therefore, modern memes in English and Scottish societies attach the same meaning to marital coercive sex as they do to the actions defined as rape. With such a subjective meaning combined with the natural action of marital coercive sex, marital rape as a problem of life is constituted. When people seek legal solutions for this problem of life, marital coercive sex is legally criminalized as rape and a marital rape law appears accordingly.

So it is the problem of life that works as the mechanism for memes in England and Scotland to exert influences on law in case of both marital exemption of rape and marital rape. Such an influence-exerting mechanism exists only in the realistic social environment not in any books or theories. This realistic mechanism shows that, even if the Christian memes supported the marital exemption of rape, the support is not derived directly from the book of Bible. Only when the memes have occupied the mind of human individuals and become live memes in a social environment, can they have really performed their function.

3 Achieving changes in law

As we have seen above, when the judges decided *R v. R*, the English statutes still explicitly prescribed the marital exemption of rape. The inconsistency between statutory law and judicial practices were obvious. At the time, though almost everybody agreed that the law ought to be reformed, however, there were still controversies about whether the change ought to be done through parliament or through the courts. M. Giles commented that "the Courts have gone beyond the bounds of their legitimate law-making powers", arguing that "it is clear that justice is best served by statutory law".⁴⁴⁶ In the Scottish case *Stallard*, Counsel for the appellant also used the point, arguing that the law on this matter of marital exemption of rape was so firmly established that only Parliament should change it.⁴⁴⁷

⁴⁴⁶ Marianne Giles, "Judicial Law-making in the Criminal Courts: the Case of Marital Rape", *Criminal Law Review*, 1992, June, p407.

⁴⁴⁷ *S. v. H. M. Advocate*, 1989, S. L. T. 469, p472. .

However, despite all the controversies, the fact was that the English judges made the decisions that substantially conflicted with the statutes. The actual development of marital rape was first carried out not by the legislature but by the judges. This may be, according to Giles, something advantageous of the judge made law. "The advantages of judge made law in this kind of case are obvious", observed Giles, "It enables development of the law to take place in accordance with changing social conditions and attitudes. It enables 'justice' to be done in an individual case, and in other similar cases coming before the courts. Its effect is immediate and specific".⁴⁴⁸

Giles seems to imply that England could be said to be lucky to be a case law country. Case laws are judge-made laws. Judges are the people who deal with the real cases all the time, trying to extract the law from the precedents. Precedents and cases are actually slices of social realities, they are the true problems of life. Legislators are lawmakers but not law practitioners while judges in case law systems are both. Once they make a law they can apply it immediately to a problem of life that waits for solution. Therefore judges might be more sensitive to changes in social environment, and make quicker reactions in law to such changes in life. And in the developing social environment, case law may have a better chance to reveal law's dynamic nature, giving a better chance to law's gradual and continuous development.

Whether or not we agree with Giles' comments on the advantages of English case law, that is what has factually happened with marital rape in England. Judges dealing with the case *R. v. R.* found that the memetic conditions in the English society had dramatically changed from those in Lord Hale's time. They found that an action that had not been thought legally problematic by old memes ought now to be regarded as rape by the non-legal memes commonly shared by people in current English society. With the new memes, a new social problem of marital rape appeared to them asking for a legal solution. And a new law was therefore found by them to solve the new problem of life of marital rape. This is why judges in case *R. v. R.* could add their gloss to the statutes that the word "unlawful" in section 1(1) of the Act of 1976 is mere surplusage and should be ignored⁴⁴⁹ And this is how marital rape law came into existence in England.

There are of course people arguing that judge made law has equally obvious disadvantages. They claim that the judge made law is either consciously or subconsciously a reflection to a certain extent of the judge's own personal interpretation of social values at the specific time and place, which may or may not be accurate and may or may not reflect legitimate cause for changing the law. As they put it, such cases often display "result reasoning".⁴⁵⁰

However, despite the alleged disadvantages, it is the fact that the criminalization of marital rape was first achieved in England by the judges before the statutes did. All this happened because of the "changing social conditions and attitudes". We have to be impressed with the powerful influence of memes upon law.

Continuity is supposed to be important to the law and case law has its essential principle of *ratio decidendi*. However, once the "social conditions and attitudes", or the well accepted memes, change, all the hitherto important principles seemed to be forgotten and the law inevitably changed accordingly.

⁴⁴⁸ Marianne Giles, "Judicial Law-making in the Criminal Courts: the Case of Marital Rape", Criminal Law Review, 1992, June, p407

⁴⁴⁹ *R v. R* [1991] 3 WLR 767.

⁴⁵⁰ Marianne Giles, "Judicial Law-making in the Criminal Courts: the Case of Marital Rape", Criminal Law Review, 1992, June, 407. Also see Atiyah, *An Introduction to the Law of Contract*, 4th ed. 1989, p63-64; Ashworth, "Interpreting Criminal Statutes: A Crisis of legality?", Law Quarterly Review, 1991 (107) p437.

English authors argued against the illegitimacy of judge's power to criminalize marital rape before the parliament. However, with the "dramatically" changed social memes, all those rational lawmaking processes seemed to be skipped.

Here, the law seems to have become the puppets of the memes, totally losing its basic principles and its expected rationality. In terms of lawmaking, it seems no longer that human beings are using social values as tools to make law but that the memes are using human beings as tools to change law.

4 Spread of the legal memes

As previously shown, the judges in England were driven on the way to criminalize marital rape because of the wide acceptance of the corresponding memes in the society. However, the corresponding memes were not marital rape itself but the basic notions of women's rights. It is these basic notions and the related memes that form a so-called meme-complex (Refer to Chapter Three), and the meme of marital rape *per se* is just one meme in this complex.

But the acceptance of the basic notions of women's rights in the meme-complex doesn't necessarily mean the specific meme of marital rape has also been well accepted. Many people may have already had in mind the basic principles of women's rights, but still they may not have the concrete meme of marital rape. This might be because some people have not personally experienced, or have never heard of or thought of, such a problem. This might also be because some people may be under the influences of both women's rights notion and traditional family ethics. These people may have accepted the women's rights as basic principles, however, when they run into the concrete problem of coercive sex within marriage, they might still have the remaining influences of traditional ethics. Thus it is not likely for them to have the standard meme of marital rape in mind.

At this time, judges make their own individual interpretation of the basic social values, which are the accepted notions of women's rights, and apply it to the concrete problem of marital coercive sex in the cases they are hearing. Then they arrive at the conclusion of the criminalization of marital rape. Thus, such a conclusion, when it is first arrived at, might have been only the individual meme of a few judges, which might not be yet accepted by the majority of the society. Like other memes, it also needs time to spread.

Theoretically, with law's nature as individual memes of lawmakers, when the judges find a new law for the first time, the memes may not well shared by the majority of the people. Therefore, in case law countries, judges as lawmakers as well as law practitioners may sometime also function as meme spreaders. It is a pity that I cannot go back in time to conduct surveys in England when marital rape was first criminalized. So I don't have the empirical data so detailed and precise as I have about China to prove the memetic condition in the English society at the time. But I do be able to draw a most likely picture of the English society at the time from the indirect empirical evidences available.

During my research, I didn't find much writings in the UK arguing against the criminalization of marital rape. This might show that, when marital rape was first criminalized, the necessary background memes had been better accepted by the law people in the UK than that in the present China. However, law people, though very important, are only a small community. The evidences about the whole society should be more important.

These important evidences are the transitional cases. The transitional cases in England before *R. v. R*, where marital rape was criminalized only under certain

special circumstances, may also evidence the gradual process of the spread of the marital rape memes. At the very beginning the complete concept of marital rape was not accepted by the judges as well. But they did feel the urge by such a meme and that might be why they managed to find circumstances under which the hitherto irrevocable consent of wives to sex could be revoked, thus limiting the marital exemption of rape. Gradually more and more circumstances where wives' consent to sex can be revoked were added till the final complete criminalization of marital rape. Here we see a typical process of a meme, the concept of marital rape, appear, spread and finally accepted.

Both the first and the second evidences have been previously seen in China as well. From this we may be able to conclude that it was quite likely there was a similar process of memetic replication in the UK as it is in present China before the complete criminalization of marital rape.

4.1.3 Conclusions

Concerned memes, or cultural elements, about women's status, are the ultimate source of validity for both the past marital exemption of rape and the current marital rape law in England and Scotland. Just like China, we also find an inconsistency in England between statute and case law in terms of marital rape. This inconsistency is also due to the role played by cultural elements, and the inconsistency is also the direct reflection of cultural elements' decisive effects on law.

When these cultural elements exert their influences on law, they do it through the mechanism of problems of life as we have discussed in the Chinese case. We find that the dual constituent structure of this mechanism also work in England and Scotland. With this mechanism and other theories of memetics, we can explain the phenomena of the development of English and Scottish marital rape laws, just as we did with Chinese marital rape in the previous chapters.

4.2 Comparative conclusions and their universality

We have now observed the evolution of marital rape laws in China and the UK as well as the role played by cultural elements in it. We find that these evolutionary processes have differences as well as resemblances.

4.2.1 Resemblances and differences

The first resemblance is that in both China and the UK there seems to be a common stage when the criminalization of marital rape was only the individual memes of the minorities, the law people, against the memes of the majorities, the lay people.

In China, as we have seen, the criminalization of marital rape is still, by and large, the result of the individual memes of the legislators, which are not yet well accepted by the majority of people in contemporary Chinese society. In contrast, though basic notions of innate women's rights, as memes native to the West, may be more widely accepted in the countries of England and Scotland than in China, concrete applications of the basic notions upon the specific law problem of marital rape, however, also faced the challenges of traditional family ethics just as in China. Dominated by basic notions of women's rights, the court hearing concrete marital rape cases may have derived from the notions the convictions in these specific cases. But such criminalization of marital rape was only in the *ad hoc* case by case style, and

it often needed some extra circumstances of the cases. The early marital rape cases in either China or England, which needed abnormal marital status for the convictions, were good examples of the kind. Such a criminalization of marital rape is, therefore, partial and incomplete. At this stage in the west, the criminalization of marital rape was still individual memes of the judges (or plus jury members) as well, which were not yet well accepted by the majority of the societies either.

From this results the second resemblance of gradualness. As in the early stages, the criminalization of marital rape was the individual memes of a few law people, these memes, naturally, took time to spread themselves to the mind of more people. Such a meme-spreading process reflected itself in the realm of positive law as the gradual process for the legal changes to take place. This resemblance lies not only in necessary transitional period for the general non-legal memes about women's rights to become the legal memes of marital rape law but also in the changes within the positive laws. Usually, in the first stage, only cases with abnormal marital conditions, such as separation, legal proceedings for divorce, void or voidable marriage, etc, can result in a conviction for the defendant. Then gradually comes the full recognition that a man can be guilty of raping his wife while the couple are still under the normal marital conditions. Such gradualness in the final establishment of standard concept of marital rape seems common to both China and the UK.

Resulted from the first resemblance is also the third resemblance which lies in the conflict between the statutes and judicial practices, shared by China and England. In China, judicial practices are conflicting against the statutes by sticking with the traditional principle of marital exemption of rape, while in England judicial practices conflicted against the statutes by criminalizing marital rape before legislation did so.

Apart from the resemblances, we also see differences between China and the UK. One difference, as already shown above, is that in China the legislation took the step ahead of judicial practices to criminalize marital rape, while things went just the other way round in the England. In England it was the judicial practices that criminalized marital rape before the statutes did. So in terms of the criminalization of marital rape, Chinese judicial practices lag behind legislation while western legislation lags behind judicial practices.

The second difference is the general meme-complexes in the societies as a whole for the specific meme of marital rape. From Chapter Three, we know that, for the sake of successful replication, memes sometimes need to co-exist to form meme-complexes in the same kind of way as co-adapted gene-complexes. One important effect of a meme-complex is that a meme depends on the existence of some other memes in its complex to survive. The criminalization of marital rape is derived from the idea of women's innate rights, which originated in the West in the recent centuries. Here we find a meme-complex, which could be generally named as women's rights notion, with the meme of marital rape as just a single common meme in this complex.

As the modern women's rights notion originated in the West, the meme complex therefore is more native like to the western countries of England and Scotland than in China. If I could take the Occident as a whole, in which England and Scotland are included, in contrast to the Orient as a foreign civilization, in which China is included, then the origin of the non-legal memes about women's rights and gender equality, which are fundamental to marital rape law, is native to the Occidental countries. And the first criminalization in the English cases, as shown previously, were developed by the judges out of these more fundamental memes in the complex. The judges held that these fundamental memes had been already widely accepted in the English societies

as basic principles of life. This means that the criminalization of marital rape in the west had in advance a fairly appropriate memetic environment with the necessary complex generally accepted in the societies as basic principles.

In China, the case is different. Either the legal memes of marital rape, like the legislation, or the non-legal memes about women's equal rights, which work as the social source of the legal memes, are of foreign origin. Though an individual might get from his own personal experiences the idea of protecting wives from their husbands, the power of traditional ethics remains strong. This means the systematic and theoretical meme-complex, which is necessary for the criminalization of marital rape, is not as well accepted by Chinese individuals as it had been in England and Scotland before the first criminalization of marital rape there. So, in terms of the necessary meme-complex, marital rape faces different social environment in China from that in the UK.

4.2.2 Common core

However, beneath all the resemblances and differences, I find the common core which is substantial to culture-law relation in both the societies above, Chinese and the UK. This common core exhibits itself in the following aspects.

1. The decisive effects of non-legal memes, or cultural elements, upon law are common to both the societies above. The decisive effect can include that the memes work as the ultimate source of the validity of marital rape law, and that the memes work as the realistic motive power to promote the reform of positive law to criminalize marital rape. In both China and England, the decisive effects are displayed in the ineffectiveness of the statutes.

The current Chinese legislation that criminalizes marital rape are the memes borrowed from the foreign soil by the legislators. The Chinese judges don't find these memes are widely accepted, and Chinese society therefore presently lacks sufficient memes from on which the legislation can derive validity. This is why the legislation that has actually criminalized marital rape doesn't have the validity that the law should have. In contrast, since there are sufficient authorizing memes of marital exemption of rape in the current social environment, there is in fact a valid rule of "no rape in marriage" in current society, customary instead of statutory. Hence the inconsistency between the statutes and the judicial practices in China.

In England, since the judges found sufficient memes in the social reality to grant validity to the rule of marital rape, therefore, even the statutes in force were couched in terms of outdated perceptions and judicial practices created a new rule which has the factual validity granted by the memes: hence the inconsistency between the statutes and the judicial practices in England, which promoted the later reform of the statutes.

2. It is common to all the societies that the memes must enjoy a sufficiently wide acceptance to have the capacity to play an effective role. Chinese society lacks the memes granting validity to the rule of marital rape, but this is not to say that there is no such memes at all in the contemporary Chinese society. Current Chinese society does have such memes, and the statutes are examples of them. The problem is that the memes are not accepted by a sufficient number of people and the weak authority results in the statutes' ineffectiveness. In contrast, when the rule of marital rape was applied by the courts in England and Scotland, it did not necessarily mean that there were no memes of marital exemption of rape at all. There were probably people who continue to be influenced by the traditional ideas. Therefore we cannot completely exclude the possibility of law circumvention in the UK as we have seen in China.

Although a 'sufficiently' wide acceptance of the memes cannot be precisely or quantitatively measured, they must influence a majority of individuals for them to play their role effectively in law. It is because of the necessary prerequisite of wide acceptance that memes have to take time to achieve that the gradual process is inevitable for the effective marital rape law to be finally established.

3. It is common to all societies that only *live* memes can have a role to play. By *live* memes, I mean the memes that are factually accepted into human mind rather than those in the unread books and the contentious theories. In current China, even if each person had one copy of the statutes criminalizing marital rape, marital rape law could not be effectively functioning as long as people refuse to accept or even read them. In the western countries of England and Scotland, even if everyone had a copy of the Holy Bible, they would not return to the marital exemption of rape as long as the people do not agree with the biblical ideas of women's affiliated status to men.

4. The problem of life, as the influence-exerting mechanism to bridge up memes, the mental beings, and law, the realistic social being, are also the most essential commonness between Chinese and the British societies in how cultural elements make an impact on law.

My definition of problem of life owes a lot to the concept of normative "meaning". And it is from this concept of meaning that I have developed my understanding of the inner dichotomy structure of the problem of life. With this dichotomy, the concept of the problem of life has actually contained in it what are usually called cultural elements. Thus this concept can be trans-cultural. That is why it explains the evolution of marital rape not only in China but also in the UK. In fact it explains the evolution of the crime of rape in general.

4.2.3 Reinterpretation of the evolution of rape in general

England has a long case law tradition, but it was not until 1976 that rape was defined for the first time in legislation. The statute was the Sexual Offenses Act 1976 as mentioned above. From the title of the Act, *Sexual Offenses*, we see that rape as a legal problem was categorized here according to only its objective part, or the natural action of coercive sex, which, in memetic terms, is the epistemic memes about rape. Such a categorization therefore cannot reveal rape's subjective part, that is, the non-epistemic memes that people have about the problem of rape. It was this subjective part, or the attached meaning, makes the problem of rape social and, consequently, legal.

However, most codified traditions seem to adopt a different categorization of rape. In China, the 1928 Criminal Law put rape in the chapter of Offences against Morals.⁴⁵¹ In Italy, rape was also under the title of Crimes Against Public Morality and Decency in 1930 penal code.⁴⁵² Actually, most countries, prior to the 1970s, categorized rape as an offense against morality or good customs.⁴⁵³

Under such categorization, though the natural action of rape is the human conduct of coercive sex, the sexual action itself is not what is considered the key element. Instead, it is the object that the action infringes, or the object the law of rape protects, that is considered as the standard for such statutory categorization. Rape is not seen only as a pure natural action of coercive sex but as a complexity with some a non-

⁴⁵¹ Major Laws of the Republic of China (LIU FA QUAN SHU). See *Major Laws of the Republic of China on Taiwan*, Magnificent Publishing Co. Tainan, 1991, p1091.

⁴⁵² *The Italian Penal Code*, trans. Edward M. Wise, Sweet & Maxwell Limited, London, 1978, p177.

⁴⁵³ Cai Daotong, p504.

epistemic meaning attached. And the meaning is that the action is against good customs or public morality.

But with other chapters in these penal codes about crimes against the person or personal rights, where the crime of rape was not included, we can therefore see that, under this categorization, rape is thought to be against good customs or public morality rather than the women's rights of sexual self-determination. Accordingly women under such a law of rape are only the object of the natural coercive sexual action but not that of the rape action in the legal sense.

However, the chapter in which the crime of rape was categorized soon changed. In the 1979 criminal law of People's Republic of China, rape was moved to the chapter of the crimes against personal rights.⁴⁵⁴ In Italy, a legal reform in 1996 moved sexual offences from "crimes against public morality and decency" to the "crimes against the person", marking the legislator's new definition of the object of the crime of rape.⁴⁵⁵

Such changes are not just the simple changes of the places that the crime of rape was written in the codes. Since the standard for the categorization of crimes in these codes is the objects that the criminal actions infringe, changes in the chapters in which rape is categorized are therefore the changes in the interests that people think the action of rape infringes, which are in fact the subjective meaning the people attached to the action of rape as a problem of law. With the subjective meaning changed, though the same natural action of coercive sex remains, the same natural action constitutes different problems under different codes: in the earlier codes the action constitute the problems of public morality and good customs while in the modern codes it constitutes a problem of the infringement of personal rights, which are already substantially different crimes. Obviously, *this* rape is already not *that* rape.

With the law working as a solution to the problem of life, the substantial change of rape as a legal problem is just the reflection of the change of rape as a problem of life. And the two-constituent structure of the problems of life (and of law) is always the important for the understanding of such a transformation between the two.

The above change in the substantial content of rape, which is from a crime against moral to a crime against personal rights, is not the only one in the evolution of the crime of rape. According one study, "from the perspective of historical analysis, the object of the legal protection against the crime of rape has experienced three stages of development: from 'the protection of the personal possessions of men' to 'the protection of public morality and good customs', and then to 'the protection of women's rights of sexual self-determination'".⁴⁵⁶ If so, the change I discussed above is only the development from the second to the third stage. A look into the first stage may give us deeper impression about the substantial changes in the nature of the crime of rape.⁴⁵⁷

In China, for example, the mortgage of wife in Qing Dynasty is an example of women as men's possessions. Under such circumstances, the legal victim of rape is a man instead of a women, the owner or possessor of the woman. Though, as a matter of fact, the natural action of coercive sex does physically harm the woman, but, as a matter of law, the crime of rape infringes the rights of the owner or possessor of the

⁴⁵⁴ *The Criminal Law of the People's Republic of China*, 1979. See <http://www.chinalawinfo.com>

⁴⁵⁵ Law n. 66 in 15 February 1996 moved the crime of rape from "*Crimes Against Public Morality and Decency*" to "*Crimes Against Personal Liberty*", marking the redefinition of the objects that the crimes infringes. See *Foreword* in CODICE PENALE ITALIANO (Chinese version), translated by Huang Feng, China Politics and Law University Press, 1998, p40.

⁴⁵⁶ Cai daotong, p504.

⁴⁵⁷ Rape in DA QING LV LI is a good example of the first stage.

woman. Corresponding to this legal definition of the crime of rape is the subjective meaning that people attached to rape as a problem of life. As women are just the possessions of men, when someone damages property of another, it is the legal rights of the owner that are infringed.

This subjective meaning attached to rape is well confirmed by what could happen to the victims of rape. According to historical documentation, many women who had been raped, instead of seeking legal protection, would afterwards kill herself or would be deserted or even killed by her own family because of the loss of her chastity.⁴⁵⁸ In many civilizations, including China and Europe, these tragedies were not, in the past, rare.⁴⁵⁹ Such social phenomena could be well explained with the subjective meaning that regards women as men's possessions because, when a possession or property has been damaged, it is quite natural to throw it away or destroy it.

However, some people may argue that even under such legal circumstances, rape as a crime of law could also be seen as an infringement of the women's own rights, for example their personal, or familial reputation was infringed. Actually women's, as well as their families', rights on the reputation were just the derivation of men's rights to things: the infringement of the reputation of the female part was in fact the exhibition of the loss of her capacity to give herself to man with chastity, which meant the undamaged possession that man desired.⁴⁶⁰

Thus women themselves could not seek the protection from the law because the law, essentially different in nature from modern law of rape, didn't see any infringements of women's rights by the action of rape. Thus, though the natural action of coercive sex have remained the same in both the ancient and modern societies, it is impossible to say that the ancient crime of rape is the same crime as the modern crime of rape

What this tells us is that, when we study rape as a concrete problem of life, as well as of law, we cannot take only the natural action of coercive sex as the whole content of rape. We must take into consideration both the objective part of natural action and the subjective part of meaning attached to get the right understanding of rape as a crime of law. Legislation may have different criteria for categorization of crime. It can be the objective part of natural actions only, like rape in English statutes. It can be the subjective part of attached meaning only, like rape in Chinese and Italian statutes. However, serious studies of rape as a concrete crime, or a problem of law, are quite another thing, which must cover both of the constituents.

Given such a methodical principle of study, we know that a crime of rape that infringes men's rights and a crime of rape that infringes women's rights are essentially different problems in nature of life and of law. However, since these different crimes share the same objective part, the natural action of coercive sex, they have been given the same name of rape. But we should realize that this linguistic coincidence in the title of the crimes reflects their commonality in the objective constituent only. If we want to achieve a more precise and complete cognition of rape, we must consider also the subjective part. And since infringing men's rights and infringing women's rights are two strikingly different meanings attached to the action of coercive sex, we therefore see here two essentially different crimes. If Professor Cai is right in saying under the statutory title of rape, there have been three different subjective meanings attached to the same natural action of coercive sex, then it is not

⁴⁵⁸ Deng Zhiwei, Xu Rong, *Family Sociology*, China Social Science Press, 2000, p163. See also: Cai Dongtong, p516.

⁴⁵⁹ Ibid.

⁴⁶⁰ Ibid.

that the same crime of rape has experienced three stages of development but that there have been three substantially different crimes that have been constituted by the natural action of coercive sex.⁴⁶¹

Only under the modern crime of rape, can the crime of marital rape be possible. The modern crime of rape, differing from the ancient crime of rape, infringes women's personal rights of sexual self-determination not men's property rights in possessions nor public morality and good customs. When rape is the crime against women's personal rights of sexual self-determination, the husband's coercive sex can certainly constitute rape; the fact the accused and the alleged victim are married is irrelevant. When rape was an invasion of male property rights, the husband's coercive sex could certainly not constitute the crime because everybody has the full right to use and dispose of his own possessions. When rape was the crime against the traditional public morality and good customs, husband's coercive sex could not either constitute the crime because sexual disputes within couples have never been an offence against the traditional public morality and good customs.

Laws of rape have been changing and this is because the crimes of rape have been changing. The crimes of rape have been changing is because crimes, which are the problems of law or the reflections of problems of life, are constituted with two parts, the objective and the subjective. When the objective part remains the same, changes of the subjective part can always cause the corresponding changes in the problems of life and of law, and consequently the changes in law itself. The subjective part of the problem of life is just the memes of the people, we can therefore see how the problem of life works as the intermediate mechanism to exert memetic (cultural) influences on law.

⁴⁶¹ It is a commonsense that the same physical action can be substantially different crimes of law (or problems of law) with different meanings attached. Here it is time that has changed the meaning attached to the same natural action of coercive sex, causing the so-called evolution of rape. We can also have examples that people at the same era of time have different attachable meanings to the same physical action, making the different possible crimes out of the same action. Concurrent crime in modern criminal laws is a very good example of this, where one action can result in different titles of crime with different legal meanings attached. The civil case discussed in Chapter 3 (See page 109) could be another example. Whether the action of the tour agency was tort or breach of contract depends on what meaning was attached to the action. However, in all the cases above, it is always that there is only one action which could result in different legal liabilities given different meanings attached.

Chapter 5 Theoretical Context of Marital

Rape Revisited

In the effort to solve the problem of Chinese marital rape, we found in the first chapter some theoretical problems concerned, which are the methodological insufficiency of comparative law and the conceptual deficiency of culture. At the end of the thesis, I will revisit the theoretical context to see whether the solution of the practical problem can help with the theoretical problems related.

5.1 Methodological improvements for comparative law

In Chapter One, I identified two malfunctions of comparative law. They are the incomparability of family laws and the helplessness to the legislators.

5.1.1 Comparability of family laws

As previously observed in Chapter One, comparatists currently find comparing family laws difficult. The reason for this are cultural elements, such as those listed by Zweigert and Kötz: “strong moral and ethical feelings” rooted in “the particularities of the prevailing religion, in historical tradition, in cultural development, or in the character of people”.⁴⁶² These cultural elements are causing confusion, even invalidity to its basic assumption “that the legal system of every society faces essentially the same problems”⁴⁶³ and that “different legal systems give *the* same or very similar solutions, even as to detail, to the same problems of life”.⁴⁶⁴ Consequently these interfering cultural elements result in the “areas in comparative law where judgment must be suspended, where the student simply cannot say which solution is better.”⁴⁶⁵

Actually that the cultural elements present difficulties to comparatists is resulted from the way that the functionalist understand the mechanism of how cultural elements exert their influence on law. Functionalists tend to take culture as an autonomous entity external to the concrete problems of life. They even view culture as antagonistic to the concrete problems of life. In the eyes of a functionalist, there are two parallel factors exerting their own influences on law separately, which are cultural elements vs. concrete problems of life. For example, functionalists consider marriage law as a solution to marriage as a problem of life. If not for cultural factors, marriage laws in different societies could be well compared since they all deal with the same problem of marriage. Unfortunately, the disturbing cultural factors, like moral and ethical feelings, make deep impacts on law and eventually cause the incomparability

⁴⁶² Zweigert & Kötz, p39.

⁴⁶³ Zweigert & Kötz, p34.

⁴⁶⁴ Zweigert & Kötz, p39.

⁴⁶⁵ Ibid p39, p40.

of family law problems like these, even though the laws are dealing with the same problems of life.⁴⁶⁶

This functionalist view does not take cultural elements as part of problems of life but as something external to the problems of life. Therefore functionalists do not see the dichotomy structure of a problem of life, the objective part, which is the natural events or actions, against the subjective part, which is the concept developed from the normative meaning or cultural element. Nor do they see this dichotomy as the mechanism for cultural elements to constitute problems of life and further on to influence law. As a result, cultural elements in the eyes of functionalists can only disturb the process of proper comparative law.

With such an understanding about cultural influences on law, it seems natural for functionalists to see family law as special and different from other areas of law. Because cultural impacts are so much more obvious in family law than in other branches of the law like tort and contract, functionalists claim that cultural elements tend to exert stronger influences on family law than on other branches like the law of obligations.⁴⁶⁷ Such a claim will inevitably lead to the conclusion that cultural elements exert different influences on different branches, heavier on some while lighter on others. Such functionalist understandings about cultural elements in law have led to the two malfunctions of comparative law that I have discussed in Chapter One.

However, given the problem of life as the mechanism between law and memetic/cultural influences, the memetic approach seems not only able to show why the functionalist understandings are problematic but it can also provide a better understanding about the incomparability of family law and thus show a way out of this predicaments.

First by taking up the concept of the meme, the memetic approach no longer takes culture as a general and homogeneous entity but as basic and microscopic units. With the concept of meme as the equivalent of the concept of meaning, memetic discovers the dichotomy in the inner structure of Zweigert and Kötz's concept of problem of life, which is the foundation of the functionalist view of comparative law. Thus, the memetic approach finds that the necessary constituent of the problem of life, the subjective part, is in fact what is usually called cultural elements. Cultural elements exert influences on law by means of influencing problems of life. From this we know that cultural elements are never external to or independent from the problems of life. On the contrary, each problem of life always has cultural elements merged inside as its own constituent. This is a very important revision of the functionalist view on how culture exerts influences on law.

Each problem of life has its own constituent of cultural elements, and the problem of life is the foundation for the existence of law that works as solution to the problem. Accordingly, all branches of law are equal in being influenced by cultural elements. Therefore it is not right to think that some legal branches like family law are susceptible to stronger cultural influences while cultural impacts on other branches, like tort and contracts, are lighter. It is only because cultural differences in the area of family law may be greater between different legal systems so that they are more apparent. This does not mean, however, that there are less cultural influences on other areas of law like the law of obligations.

We cannot deny the cultural elements in tort and contract laws just because they are more similar between different jurisdictions. Similarly, we cannot exaggerate the

⁴⁶⁶ Zweigert & Kötz p39.

⁴⁶⁷ Glendon, "Irish Family Law in Comparative Perspective", 9 Dublin University Law Journal (1987), 1.

cultural elements in family law just because they are more different between different jurisdictions. There is an analogy for this. If you write a word with a black pen on the blackboard, you cannot deny the word *is* there on the blackboard just because the word is as black as the board. If you write one word with the black pen on a whiteboard, you cannot claim there more than one word you write there on the whiteboard just because of the sharp contrast of colour between the word and the board.⁴⁶⁸

As previously quoted, Zweigert and Kötz's view of comparative law is based on the fundamental assumption that each society faces essentially the same problems of life. Only the laws that function as the solutions of the same problems of life are comparable. Otherwise they are incomparable. And it is a "beginner's" mistake to compare the incomparables.⁴⁶⁹ However they seem to find that in family laws, due to the disturbing cultural influences, essentially different solutions may also be offered to the same problems of life and accordingly leads to the suspension of effective comparative law.⁴⁷⁰

Alan Watson says: "when the starting point is a branch of law, the difficulty arising from the variations of political, moral, social and economic factors for any valid comparison recedes to some extent, ..."⁴⁷¹ But in the branch of family law, what Zweigert and Kötz have found seems to be not the recession but the boom of the difficulty. And they are not clear how to compare the legal problems like: "Should freedom of testation be curtailed in the interests of a decedent's widow and family? Under what conditions should divorce be possible? Should same-sex marriages be permitted or some comparable legal regime be on offer? Should unmarried persons be allowed to adopt?"⁴⁷²

In contrast, in contract law, tort law and other branches of law that have not too many cultural differences, Zweigert and Kötz are confident with their functionalist comparative law. They can talk from a comparative perspective about how different legal systems deal with similar problems like when offers are binding, the protection of the purchaser's interest in land from the possible harm by a third party, and so on.⁴⁷³

I would like to quote again their example of the protection of the purchaser's interest in land from harm by the third party. With this example, Zweigert and Kötz suggest that the comparatist must sometimes look outside the law.⁴⁷⁴ While protection is afforded by the land register system in Germany, the same function is performed in the United States by filing and title insurance companies. However, whether outside or inside the law, the example, according to Zweigert and Kötz, points to the general conclusion that we can find the same or very similar solutions to the same problems of life even in different legal systems.⁴⁷⁵ Despite the differences in historical development, conceptual structure, and style of operation *of the law* in Germany, France, England and the US, the same problem *of life* is shared by these societies,

⁴⁶⁸The fallacy here actually involves the common misunderstandings about the concept of culture. Usually, as one of the misunderstandings, people tend to take the beliefs or values that are different from their own as cultural elements. Interestingly, they are reluctant to admit the fact that their own beliefs or values, which they take for granted, are also cultural elements. This misunderstanding results from one of the essential attributes of the concept of culture, the externality, which I discuss in more detail in the next part (p152).

⁴⁶⁹ Zweigert & Kötz, p34, p35.

⁴⁷⁰ Zweigert & Kötz, p40.

⁴⁷¹ Alan Watson, *Legal Transplants*, p5.

⁴⁷² Zweigert & Kötz, p39.

⁴⁷³ Zweigert & Kötz, p39.

⁴⁷⁴ Zweigert & Kötz, p39.

⁴⁷⁵ Zweigert & Kötz, p39.

which is the need to protect the purchaser of an interest in land from the harm that could result from outstanding and unknown rights of third parties. The problem exists in all the societies mentioned above and, therefore it is an obvious that, as implied in the conclusion arrived at, the solutions are the same or similar because “the problems of life” are the same.

Taking a closer look, we can find the commonality of this problem of life lies not only in the objectively existence of the land, the purchaser’s ownership of the land and the possible harms from third parties; but also in the well-accepted meme of people about all the facts, the meme that the rights of the purchaser as the owner of the land *need to* be protected against the competing interests of third parties. It is the combination of the objective facts together with the meme about the facts that constitutes this concrete problem of law: how to protect the interests of land purchaser against possible harms by third parties. The meme is not necessarily a legal one; it can also be moral, general cultural or merely accepted commonsense. But the non-legal meme that the rights of land purchaser *need to* be protected is an indispensable part of the concrete problem of life on *how to* protect. Otherwise, the objective facts alone cannot constitute the problem of life, which Zweigert and Kötz think activates the creation of the concerned laws. So it is the commonality of both the objective facts and the subjective meme about the facts that constitutes the commonality of the concrete problem of life, and consequently generates the commonalities or similarities of the laws in different countries. The only differences that may take place are on *how* to protect, which are procedural and technical, because different societies may have their own particular ways to achieve the same protection.

But, in family law Zweigert and Kötz seem to find that “different legal systems answer these questions quite differently”.⁴⁷⁶ I may infer from the claim that, in the case of family law, different legal systems may have quite different solutions for the same problem of life, which is actually a denial of the conclusion arrived at in the first place.

I take one of the examples given by Zweigert and Kötz, say, “Should same-sex marriages be permitted, or some comparable legal regime be on offer?”, to see whether there is a realistic existence of the *same* problem of life and whether this same problem of life has quite *different* solutions in different legal systems. As Zweigert and Kötz do not give any further analysis after giving the family law examples, I will go on with further analysis with the question.

In some modern societies, mainly the western countries in Europe and North America, there appears a new meme, which is a growing recognition of the rights of the homosexuals.⁴⁷⁷ The implication of the meme is that homosexual people ought to have the same rights as the heterosexuals, including the right to marriage. With the spread of the meme, there appears the demand for the recognition of the relation based on homosexuality, which is just like the relation based on heterosexuality called marriage. The demand naturally leads to the argument whether same-sex marriages should be permitted or not. This argument is what makes the new “the problem of life”: the equal recognition of homosexual relation, or, as people usually call it, the same-sex marriage. In this new problem of life, the new meme about homosexuality plays an indispensable part. Although the natural fact of homosexual relations has always been there, it was not until the appearance of the new meme and its combination with the fact of sex activities between people of same gender that the same-sex marriage as a realistic problem of life come into being. So far, it is only a

⁴⁷⁶ Zweigert & Kötz, p39.

⁴⁷⁷ Willekens H, “*The Latest in Comparative Family Law*”, EuroData Newsletter, :9(1999), p. 13-15

problem of *life*, not yet a problem of *law*. However, as the meme is winning over its opponents and becomes more widely accepted in the society, law, as the reflection of its social environment, must correspondingly change. This is when the problem of whether same-sex marriages should be permitted or not comes from the realm of real life into the realm of law and becomes a legal problem. Afterwards, when this problem exists in more than one societies and different laws have been made about the problem, some comparable legal regimes will be available.

So it is possible to make comparison between the laws in some European countries where there has already been a growing recognition of the homosexual couple in the legal regulation. For example, all the Nordic countries, except for Finland, as well as the Netherlands have created the institution of “registered partnership”, thus enabling homosexual couples who wish to do so to acquire all the rights and duties of spouses, with the sole substantial exception of the rights pertaining to parent-child relations.⁴⁷⁸ In Belgium, a kind of registered partnership has been created that, though symbolically recognizing the legitimacy of the homosexual couple, is of very little practical import, because each party can terminate partnership duties at will without having to give notice.⁴⁷⁹ In France, a partial recognition of the legitimacy of the homosexual union has taken the road of social security law and of case law deeming homosexuality an irrelevant element in awarding the surviving cohabitee damages for the loss of consortium and in custody decisions.⁴⁸⁰ Registered partnerships above are different from each other, and they are also different from the so-called same-sex marriage. However they are all legal remedies for the same problems of life, that is, the problem of giving the legal recognition to the homosexual relations. That is why we can talk about them and make comparisons between them. All these talks and comparisons have a fundamental prerequisite, which is that demand for the recognition of homosexual relation is shared by all the countries above as a problem of life. Once the same problem of life is there, we have the foundation for the comparison of different legal remedies.

However, on the other hand, in some other societies that are traditional and conservative, people still see homosexuality as an abnormal deviance and marriage is defined inherently as the special relation between man and woman. This means that people in those societies have their own perfectly self-satisfying theories, values or beliefs about the irrelevance between marriage and homosexuality. With these theories, values or beliefs, the so-called problem of same-sex marriage is completely eliminated at the level of real life. Because, though the natural fact of homosexual relation also exists in these societies, with no subjective recognition of homosexuality to combine with the fact, same-sex marriage cannot become a realistic problem of life. While the problem of life doesn't exist at all, it would be unreasonable to talk about the law on this problem.

Now we have two groups of societies. One group has the demand for recognition of homosexual relations, which I call liberal, while the other has no such demand, which I call conservative. If we try to make comparison between these two groups of societies, we will run into the problem of comparability.

As we have known, societies within the liberal category do share the same problem of life of the recognition of same-sex relation, but the societies under the conservative category do not have such a problem of life at all. Though both liberal and conservative societies share the natural fact of homosexual relations, they do not

⁴⁷⁸ Ibid.

⁴⁷⁹ Ibid.

⁴⁸⁰ Ibid.

share the subjective memes about the fact. Therefore, they do not share the same problem of life that is based on the natural fact of homosexual relations. As there is no same problem of life shared by these two categories of societies, there are no laws of same-sex marriages that fulfill the same function. Given the basic prerequisite that “in law the only things which are comparable are those which fulfill the same function”, the so-called same-sex marriage laws are incomparable between these two categories of societies.

So, Zweigert and Kötz’s question: “Should same-sex marriages be permitted, or some comparable legal regime be on offer?” is not a counter-example, but another supporting example of the conclusion that “different legal systems give the same or very similar solutions, even as to detail, to the same problems of life”. Because, in this case, different legal systems are actually addressing different problems of life. It is true that the student simply cannot say which solution is better, however, it is not because the solutions are too different but because the solutions are incomparable, as they are the solutions to different problems of life. So it is an apple and orange problem. Consequently, it might not be appropriate for Zweigert and Kötz to cover it under one single question because using the question “Should same-sex marriages be permitted, or some comparable legal regime be on offer?” to refer to different legal systems in different civilizations is in fact to compare the incomparable, which, in Zweigert and Kötz’s own words, is a mistake of “the beginner”.⁴⁸¹

Thus, though family laws do have problems of comparability in contrast with tort law as such, but the problems of comparability are not the kind that Zweigert and Kötz suggest. That is, the incomparability of family laws is not caused by stronger cultural influences than other branches of law but is because people are actually trying to compare the incomparable. Therefore the fault lies neither in family law nor in cultural influences but in the comparatists’ own misunderstanding.

Fortunately, with the memetic approach, we now can see that family law is not so special as we thought compared to branches like tort or contract law in terms of cultural influences. Because, all branches of laws are to solve their problems of life, and every problem of life consists of both the objective part and the subjective cultural part. So culture exerts its influence on family law in exactly the same way as it does to the law of obligations. The difference is that the cultural constituents, the memes, inside the problems of life that family law tries to tackle are more easily different from country to country while those of tort or contract law are more likely to resemble each other. And the difference is only that of quantity not that of quality. So, instead of being special, family law follows substantially the same principle as other branches of law, like tort or contract, in terms of the relation between law and culture.

Conclusively, different subjective parts mean essentially different problems of life. Current confusions about the incomparability of family laws are rooted in mistaking the essentially different problems of life for the same problems of life and the according attempt to compare the incomparable. To avoid this mistake, we must realize that we cannot decide a concrete problem of life only by its objective part. With the improvement in methodology, comparatists should know better about what ought to be compared and what ought not to. They should also know better where the differences start and where the commonalities stop. As a result, comparative law could do better in promoting its basic ability to make comparisons between different legal systems. This is how memetic approach has helped with the first malfunction of comparative law mentioned in Chapter One.

⁴⁸¹ Zweigert & Kötz, p34, p35.

5.1.2 Help with the legislators

The second malfunction, as I mentioned, of current comparative law is its failure to assist with legislators. The memetic approach may also be able to help with this malfunction. As said in Chapter One, comparative law is expected to offer aids to legislators when they attempt to borrow laws from other legal systems. However, in case of the laws with strong cultural influences, like marital rape law, this function of comparative law would easily fail.

One of the reasons current comparative law fails to provide such help is its failure to make comparisons of culture-impacted law. If a law in the original society is found incomparable with any laws in the receptor society, there must be a lack of some basic social foundation, which is essential for the law to survive in the receptor society, and successful legal transplantation is therefore also impossible. The memetic approach can be helpful at the point because it has achieved the clarification of the problems of incomparability in family laws. By clarifying why some family law problems are incomparable, legislators could have better ideas about what laws can be borrowed while what cannot.

Specifically, for those incomparable family law problems, it is not that they are the same problems and incomparable. On the contrary, they are often essentially different problems at all. This means it is not that different societies have different laws for the same family problems but that different societies have substantially different family problems of life. Different problems naturally will need different solutions. Laws, as Zweigert and Kötz say, are solutions of problems of life. Therefore legislators must make sure that they do have the same problems of life in their own society that needs it as solution before they decide to borrow a law. Otherwise, if legislators borrow a law from a foreign society that functions to solve a problem of life that they do not have in their own society, the borrowed law would have no need to exist and would therefore be ineffective. Hence an unsuccessful legal transplant.

Current Chinese marital rape law, in a degree, has been one of these legal transplants. Though, by following western legal principles, current Chinese legislation has criminalized marital rape, however, marital coercive sex had already been well solved, by ethics or other norms. Therefore, when marital rape law was transplanted into China, there were, initially, no problems that needed it to solve. Consequently, such a borrowed law could only be ineffective. If the Chinese legislators do want to make the transplanted marital rape law effective, their work is not to improve law. Rather, the only thing they can do, as the memetic approach has pointed out, is to make marital rape become a problem of life that needs the law to solve.

Fortunately this is what has been happening. As shown in Chapter 2 and 3, the memes of the criminalization of marital rape are being accepted by more and more people. With the memes spreading, the society will consider marital coercive sex as a problem of life and of law. Only when marital rape has appeared in Chinese society as a problem of life that needs legal solution, can the borrowed law of marital rape really have the chance to perform its function.

The lesson we should learn from the ineffectiveness of the borrowed marital rape law in China is again how to decide whether a problem of life actually exists. The objective part of the marital rape as a problem of life, the natural action of coercive sex between husband and wife, has always been there, in China and the West, in modern and ancient times. Therefore, the key factor to decide the realistic existence of the problem of life is to decide whether the subjective part, or the corresponding memes, actually exists.

Since what we study is a problem *of life*, the subjective part we seek must also be the memes of life, that is, *live* memes. Therefore when legislators try to decide that there is a problem of life in their own society so that they can offer a solution of law to it, the subjective part they find must be the wide-spread live memes in the society. Any memes from books or other societies, as long as they are not yet accepted in the realistic social environment, cannot be the basis for legislators to decide that the corresponding problem of life exist in their society and to consequently legislate for it. This is where the legislators of current Chinese marital rape law made mistakes. They legislated supposing marital rape already existed in Chinese society as a problem of life that needs a legal solution. However, legislative background shows that the memes they have in mind are not obtained from the realistic Chinese society but are only some abstract conceptions from the west. That is, these memes are not yet live memes in Chinese society and the problem of life therefore didn't actually exist, which consequently caused the ineffectiveness of the current marital rape law.

To decide the existence of a problem of life that needs legislation, it is always necessary to ensure that live memes exist in the realistic society, not in books or other societies. Such a conclusion arrived at from memetic approach could be quite helpful to legislators when they try to achieve more successful and effective legal transplant from foreign societies.

5.1.3 Unity of functionalism and culturalism

So, the memetic approach seems to be helpful with the two functions of comparative law, in either comparing culturally-impacted laws or helping legislators in legal transplantation. Why it can do this is because the memetic approach has actually united both the functionalist and the culturalist approaches in comparative law.

Usually functionalist approach and culturalist approach are thought to be two separate or even antagonistic approaches in comparative law. The functionalist approach bases its methodology on what Zweigert and Kötz call the problem of life. As we know, the problem of life in Zweigert and Kötz's understanding refers only to the natural facts, which in my terms is the objective constituent. Thus, by excluding the cultural elements from the problems of life, the functionalist approach can easily find the commonalities of natural facts in different societies. It is upon these commonalities of natural facts that Zweigert and Kötz claim that different societies have essentially the same problems of life.⁴⁸² As law's function is to solve these problems of life, accordingly, Zweigert and Kötz establish the possibility of comparative law upon the commonalities of natural facts in different societies, which, to their understanding, is to compare the different solutions for the same problems of life.⁴⁸³

The culturalist approach, on the other hand, establishes its methodology upon the concept of culture, which refers to people's values, opinions, attitudes, etc. about physical facts, or, in my terms, is the subjective memes or meanings about the physical facts. Contrary to the functionalist approach's emphasis on the commonalities of natural facts, the culture approach emphasizes the inherent cultural differences between societies as well as the influences of the cultural differences on law. With cultural differences as their foundation, the culturalist approach tends to stress the

⁴⁸² Zweigert & Kötz, p34.

⁴⁸³ Zweigert & Kötz, p34-35.

diversity instead of the commonality of laws in different legal cultures. Naturally, culturalism is pessimistic about comparative law.⁴⁸⁴

As Pierre Legrand argues,

“Because insensitivity to questions of cultural heterogeneity fails to do justice to the situated, local properties of knowledge, the comparatist must never abolish the distance between self and other. Rather, she must allow the self to make the journey and see the other in the way he must be seen, that is, as other. The comparatist must permit the other to realize ‘*his* vision of *his* world’. Comparison must not have a unifying but a multiplying effect: it must aim to organize the diversity of discourses around different (cultural) forms and counter the tendency of the mind toward uniformization. Accordingly, the comparatist must emphatically rebut any attempt at the axiomatization of similarity, especially when the institutionalization of sameness becomes so extravagant as to suggest that a finding of difference should lead her to start research afresh! To quote Gunter Frankenberg, ‘analogies and the presumption of similarity have to be abandoned for a rigorous experience of distance and difference’ I argue that comparison must involve ‘the primary and fundamental investigation of difference’.”⁴⁸⁵

It seems differences between culturalism and functionalism could not be greater in either their theoretical foundation or their objective of study. But actually they share some essential commonalities. The first commonality is that they both separate natural facts from the cultural elements of these natural facts. The second commonality, which is the result of the first, is the incomparability of culturally-impacted laws. Confronted with cultural influences on law, functionalist sadly claim that comparisons have to be “suspended” and they feel sorry for the helplessness of their functionalist approach while culturalists proudly claim that “I told you so” and they feel happy with the difficulties caused by cultural elements to comparative law because this is exactly what they preach. Happy or sorry, they arrive from different roads at the same destiny of the incomparability of culturally-impacted laws.

The memetic approach seems to offer a third way out. The problem of life is the fundamental concept for the functionalist approach. However, by developing its dichotomy structure, the memetic approach has successfully merged cultural elements into this functionalist concept. Thus in the memetic understanding of the problem of life, natural facts and the cultural elements are perfectly combined together. This is the most significant difference of the memetic approach from either functionalist or culturalist approaches. With this uniqueness, the memetic approach has actually combined functionalism and culturalism as an organic one. With the two inalienable elements finally reunited, the memetic approach will not encounter the dilemmas of either functionalism’s sad helplessness or culturalism’s happy exaggeration of the incomparability of culturally-impacted laws because cultural elements in memetic eyes are no longer disturbing external factors but have become the inherent constituent inside the problems of life and of law.

Why cultural elements can be merged into the problem of life as one constituent is due to another specialty of the memetic approach. Under memetic approach, we observe culture no longer as a general and homogeneous concept but as the basic memes of each human individual. Each meme is always related to its natural counterpart in human society to constitute the problem of life, which, in turn, becomes

⁴⁸⁴ Legrand, “*How to Compare Now*”, *Legal studies: The journal of the Society of Public Teachers of Law*, 16(2), 232 - 242.

⁴⁸⁵ Legrand, “*The Impossibility of Legal Transplant*”, *Maastricht Journal of European and Comparative Law*, 1997, p123-124.

a problem of law in legal studies. Such a mode of thinking provides more precise conclusions about whether the problems of life in different societies are the same or not, and thus provides better foundation to make comparisons of laws. And this is why I have been able to make comparisons of marital rape laws, which are usually inextricably linked to incomparable family laws, between China and the UK, which are usually thought to be strikingly different legal systems and cultures.

5.2 Conceptual clarifications: culture v. meme

If the memetic approach has demonstrated any advantages in culture and law studies, the success flows from the conceptual construction of the meme and the meme's substitution of the general concept of culture. Concepts are cornerstones of theories. The strength of the fundamental concept decides the strength of the theory built upon it. As I have previously shown, the deficiencies of culture approach in legal studies owe a lot to the deficiencies of its basic concept of culture. Thus, the memetic approach owes its success to better definition of its fundamental concept of meme.

Now I will go back to where I started to revisit the basic conceptual foundations of both approaches for further and detailed comparisons of the concepts of culture and meme.

5.2.1 Different angles of view upon the same essence

1. The same essence

The objective that the concept of culture reflects is the same thing in essence as that of the meme concept. We can get to know this from the usual definitions of culture.

We have seen quite a few definitions for the concept of culture in Chapter One. The definitions may vary in different ways, but, despite all the differences, they all share the same view about the essential nature of culture that culture is a group of memes. In Tylor's definition, "knowledge, belief, morals, law," are obviously memes and mostly unmaterialized memes. "Art" is also an often materialized meme. Custom and habits are the patterns of how people do things, or, in another word, actions, which are therefore materialized memes. Capabilities of human beings all result from their thoughts, which are also memes. So we find from the substance of Tylor's definition of culture nothing but memes. In Cotterrell's definition, "Belief, attitudes, cognitive ideas, values and modes of reasoning and perception" are surely memes. "Understandings, outlook" are also memes. So we find the same thing in nature as that in Tylor's definition. Thus, we can be sure that cultures are memes and memes are culture; they are the same thing in essence.

2. Different angles of view

The concepts of culture and meme share essentially the same object of study, but they turned out to be two different concrete concepts. What starts the divergence is a superficial technical distinction, which is the difference in the two concepts' perspectives of the same thing.

Meme is an individualistic concept, referring to an individual meme, while culture is a collective or general concept, referring to what is typical or shared in the society. So the concept of meme indicates solely and directly the inner essence shared by the two concepts --- the memes, without caring about the external form of how the memes appear to be when they gather together. The concept of culture, on the other

hand, has two connotations: first, the inner essence of memes; secondly, the external exhibiting form of the essence, which is the form of aggregation, collective or group. Technically the concept of culture is a more complicated one, covering not only the inner essence but also its form of external appearance, or its camouflage.

Accordingly, the concept of culture exists only to the outsiders because an insider cannot see the external appearance. This means the concept of culture exists only when different cultures exist to those who see from outside a culture. An insider who knows only his own culture ought not to feel the existence of culture because, once inside, he sees no external appearance of collectiveness but only himself and many other individuals. But, if a person from a different society looks at another society from the external point of view, he would find at the first sight, instead of the differences between individual memes, the special integral characteristics of the meme-complexes in the society. That, then, is the general and collective concept of culture. Thus external view, which I call the externality of the concept, is indispensable to the concept of culture.

So, I can say that the usual concept of culture is actually the external view on the generality of widely-shared individual memes. Its constitution needs three necessary conditions: 1) *individual meme* as the innermost nature; 2) *generality* as the essential mark of culture from individual memes; 3) *external view* to make the concept positive.

When a meme is held only by one individual, it is only a basic cultural element that has the probability to constitute the general concept of culture but lacks generality. When the meme is shared by all or a sufficient majority of people, it gains its generality in the society. With the first two stages completed, culture as a general concept has come into its substantial existence but is still in the potential not conspicuous state. Now comes an outsider to view it externally, the existence of shared individual memes as a general whole gets out of the concealed state and becomes visualized before people consciousness. And this is what we positively have as the general concept of culture.

Thus, without the general and external view, if I want to be radical, I can say that culture is not a real being, only individual memes are. A good analogy can help with the understanding of the point. A cloud is the external and collective form of appearance of moistures or water droplets. A cloud exists only to the person who looks generally at all the moistures as a whole from the outside while, once inside, he sees only real moistures or droplets, not a piece of cloud with its particular shape or color. Without the external view, the usual concept of cloud will just vanish. Thus, to internal moistures, a cloud doesn't exist, only moistures do.

To say that culture is not a real being is only technically valid in terms of the concept's connotation referring to the superficial external appearance of the inner essence. However, such a radical view may be of practical significance. First, it helps to achieve a clearer understanding of culture's inner essence as memes. Secondly, it helps to clarify the puzzle of how culture exerts its influence.

As culture is not a real being, it certainly cannot exert influences upon individuals as a positive entity. Taking an internal view, we see no culture but only individual memes; we see no cultural influences but only the influences that individual memes exert on one another. So the so-called cultural influences are in fact the external appearance of the influences that individual memes massively exert on one another. To some extent, it would be closer to the truth to say that there is no cultural influence but only individual memes' influence.

To return to the analogy. It would make the understanding easier. Colour and shape are essential to the existence of cloud but they are in fact the external appearance of the collectiveness of certain water droplets and therefore, do not exist in the eyes of droplets. Droplets of water may exert influences on one another, which will change the color and shape of a piece of cloud, but the color and shape can never exert any influence on any droplet.

3. A fallacy to correct

The concept of culture views its objective from a macroscopic and external point of view upon a society or social group as a whole, and it sees culture. The meme concept views its objective from a microscopic and internal point of view upon each individual separately, and it sees individual memes. The understanding about the importance of the external view in the constitution of the general concept of culture can be very helpful in clarifying why some common opinions about law and culture are fallacious.

For instance, when talking about the Chinese marital rape problem, the supporters of the criminalization of marital rape tend to think the decriminalization of marital rape is a result of the traditional Chinese cultural elements, while the criminalization of marital rape is what legally ought to.⁴⁸⁶ Why Chinese law cannot do it now, according to these people, is because of the interference by cultural elements, like traditional Chinese ethical ideas about family and marriage. However, these people are less likely to view the arguments of the criminalization of marital rape as cultural arguments. Instead, they are more likely to take the arguments based on the women's rights of sexual self-determination as absolute and universal as Professor Cai does, instead of relative and cultural.⁴⁸⁷

Such a biased viewpoint reveals not only the western-centricism but also the conceptual fallacies. Actually both the ideas of women's independent rights of sexual self-determination within marriage and the ideas of women's sexually affiliated status to their husbands within marriage are ideas about the sexual relations within marriage. That is, they are both memes. Therefore they are both cultural elements in nature, even the notion of women's independent rights of sexual self-determination, on which the western-originated marital rape law is based, is equally cultural in nature as the traditional Chinese ethical ideas.

The conceptual fallacy here is a typical result of the characteristic of externality of the concept of culture. All people may have the tendency to be self-centered; they are more likely to take their own beliefs as absolute and necessary while the different beliefs of other people as contingent and accidental. That might be why western-centricists in China see the counterpart memes in an inappropriate way. However, knowing the externality of the concept of culture, we can realize that these western-centricists have taken an external view on the memes of the traditional Confucian ethics but not on the memes of modern western notion of women's independent rights. This leads to their view of taking the Chinese memes as relative cultural elements but their western ones as absolute. Rationally speaking, this is certainly fallacious.

The different perspectives are not only the reason for two different concepts of culture and meme, but also the final reason for all the other minor distinctions between the concept of culture and the concept of meme, which I will discuss in detail next.

⁴⁸⁶ Cai Dongtong, "Jurisprudential Research into Marital Rape" *Criminal Law Review*, vol.10, 2002, p499.

⁴⁸⁷ *Ibid.*

5.2.2 More conceptual differentiation

1. Collectivity and individuality

As the concept of culture takes a macroscopic view on society, it usually sees the most typical or representative groups of memes, which are the most dominating and powerful. This decides the collectivity of the concept of culture and is also the evidence to show that culture is widely accepted memes, or stable memes as I also call them. With such a view, the concept of culture may overlook many unstable memes, or instant memes as I also call them.

As the concept of meme takes a rather microscopic view on individuals in the society, it sees only individual memes spreading around. This decides the individuality of the concept of meme. With such a view, the concept of meme doesn't try to grasp the whole society in one hand, but it can usually get a more accurate and complete picture, which is therefore closer to the reality.

Many other differences between the two concepts are related to this collectivity-individuality distinction. With the general view on societies, the concept of culture is often marked with the collective or general symbols of societies: racial boundaries, geographical boundaries like countries and nations, or other symbols that can mark the existence of an autonomous society. It is for this reason that we often talk about Chinese culture, European culture, Black culture or Arab culture. If several individual legal systems share some common legal memes, people will again, instead of viewing them individually, put them together and give them a collective name called legal culture. So, we talk about Anglo-American legal cultures or the Continental legal cultures. Marks of social boundaries are always very good symbols of culture.

In the concept of meme, on the other hand, marks of social boundaries, like race, nation or country will lose their eminent importance as in the concept of culture. The concept of meme takes the individual meme as the only criterion and the concept is just self-defined by the individual meme as it is with no references to other elements, whether geographic, racial, etc. The individualistic view prevents the concept of meme from paying too much attention to the collective features of a country, a nation or other geographic types of community. Thus, either the special culture of a country or that of a legal family is not the core of the concern of this microscopic approach but is often ignored. Social marks like racial or geographical boundaries weigh much less. Therefore we do not talk about Chinese memes, European memes, British memes, etc. Instead we talk about marital rape memes as "marital rape" is the substantial contents of the memes *per se* not an external feature of them. Usually we can only name a meme with itself, which is different from culture.

2. Feelings of different cultural influences in different legal branches

With the internal view, the concept of meme does not see culture as a positive entity but only piecemeal memes dissolved in the problems of life to exert influences on law. Memes as social factors, which are cultural elements according to the concept of culture, can never be seen as autonomous and alienable from economic or other social factors. With the strong emphasis on the external view and the generality of the concept, the concept of culture, on the other hand, inevitably takes culture as a positive entity, exerting influences on law distinctively from and equally to economic, political and other social factors. The external view of the concept of culture upon its observatory objective is a very important feature of it, which I have referred to as externality.

This externality feature can well explain the so-called difference of cultural influences on family law problems compared to tort problems. The external view

upon the meme part of the problem of life actually means that cultural influences exist only when the subjective parts of the problems of life are different. That is to say, given that the objective part of the problem of life is the same, if the subjective meme parts are different, then people feel the existence of the so-called culture. On the other hand, given the same objective part, if the subjective meme parts are also the same, then people do not feel the existence of culture.

Subjective memes in family problems more often than no differ from society to society while those in tort problems are relatively more similar. For example, the memes of a Chinese individual about marriage or marital rape are often remarkably different from a Muslim or from a Christian. But there may not be much disagreement about whether someone whose leg has been broken by wrongful conduct should be compensated for his loss. Marital rape problems, with the different memes inside, appear different from each other and thus give people strong feelings of cultural influences in marital rape law. Broken leg problems with similar memes may not appear to differ from each other so much and thus do not provoke such strong feelings of cultural influences in tort law. However, either the disagreements on marital rape or the agreements on broken leg are all memes, which therefore all are culture elements in nature. With memes always there as the constituent in each problem of life, we can see that culture elements weigh exactly the same in either family law problems or tort problems. So it is not appropriate to say culture exert more influences on family law than tort law. It is just that subjective memes in family problems are often more distinctive than those in tort problems.⁴⁸⁸

As the analogy of a black word on the white or black board has told us, though the word is always there, people sometimes see it and sometimes not. Similarly, the so-called difference of cultural influence could also be a delusion since it is just a one-sided feeling from a certain point of view --- too macroscopic point of view. Bigger differences of subjective parts in the family problems with the same objective part are the cause of people's feeling that culture exerts greater influences on family law while smaller differences of subjective meme parts in the tort problems with the same objective part are the cause of people's feeling that culture exerts smaller influences on tort law. The fact is that, from a microscopic point of view, the substantial cultural elements hold the same weight in all the problems of life.

3. Clarification of vagueness

Cotterrell says that culture is the "shared understandings", "common outlook" typical of a particular society or social group.⁴⁸⁹ However, Cotterrell's "common outlook" reveals that the concept of culture refers only to a few typical or dominating memes in the society. However, in any society, not only these several dominating or typical groups of memes exist, there are many more not so dominating and typical ones. If we use the general concept of culture, which refers in fact only to the

⁴⁸⁸ Why are subjective memes in problems of family more distinctive than those in problems of tort? This is a question about the origin of meme. This is a very good question for memetics about how and where memes come, but it is too remote to be necessarily relevant to the current discussion about law and society. When we study culture and law, we care about how culture exerts its influences on law but we don't care about how or from where culture comes. We know cultures are there, that is all we need. Knowing where to start and where to stop is essential for any rigorous and scientific study. As Max Weber says: "The social relationship thus consists entirely of the probability that individuals will behave in some meaningfully determined way. It is entirely irrelevant why such a probability exists but where it does there can be found a social relationship". So, we don't have to know *why*, we only need to know some memes *are* more distinctive while some *are* less, and that's enough for sociological discussion.

⁴⁸⁹ Cotterrell, "The Concept of Legal Culture", Comparing Legal Cultures, Dartmouth, p25.

dominating ones or the so-called high cultures, to cover all of them, we are actually ignoring many others. And this is the vagueness of culture.

The concept of individual meme, in contrast, can be much clearer. Meme refers to not only the high culture elements, like religion, ethic, etc., but also any mental beings that conduct human behavior, like a special personal view on life or the world. Meme refers to not only outcomes of human rationality, like cognitive memes, but also those resulted from human passions, instincts or even impulses, like the desire to eat when hungry, the desire to possess out of instinctive greed or the meme to have sexual intercourse caused by sexual impulse. Meme refers to not only the stable mental beings, like beliefs or values, but also the instant memes, like the instantaneous meme of a rapist that activates his action.

With the broader connotation, the concept of meme can overcome the defects of partiality of the concept of culture, including much larger variety of what's usually called cultural elements that exert influences on law. When talking about law and culture, we do not have to be restricted to those several dominating religions, ethics, or the writings of the philosophers who died hundreds or thousands of years ago. Rather, we can concentrate on the real lively human individuals who we know so well and who are the real subjects of the law, we can always specify exactly what meme are exerting the influences. Thus we can easily overcome the vagueness of the concept of culture.

4. Difference-oriented or commonness-oriented

Culture as a concept is general and homogeneous in nature, and that's why one society usually has only one symbolic culture to mark itself from other societies or cultures. When the culture in Britain is listed side by side with the culture in China, inevitably, the most likely meaning implied is that they are two different cultures. "Cultural differences" seems always the most related term with the concept of culture. Thus, the concept of culture seems to be inherently difference-oriented.

Memes, on the other hand, don't have the whole society as the basic unit of conceptual foundation as culture does. Instead, the concept of meme bases itself on the subindividual mental beings in the mind of human individuals. From such an individualistic perspective, memes in any two societies can be different as well as common. Confucianism is of course different from either Christianity or human rights notion. But it is not so surprising to find many human individuals in today's China who share the same viewpoints about marital rape with human individuals in either today's Britain or even Britain two centuries ago. Therefore, compared with culture, the concept of meme can be as easily commonness-oriented as difference-oriented.

With this special advantage of the concept of meme, we can discover both cultural differences and cultural commonnesses in the societies, China and the UK for instance, where only differences are found under the general concept of culture. This is why I can do comparative studies in the previous chapter on both the differences and the resemblances between China and the UK on their marital rape laws, though they are usually thought to be incomparable due to cultural differences.

The most important reason why memetic approach can do this is its special ability to locate cultural commonness in the usual cultural differences. And the special ability in turn is resulted from the commonness-oriented nature of the concept of meme. With this nature, memetic approach can not only make comparisons of marital rape laws in China and the UK but can also solve the problem of incomparability of family laws and other laws with strong cultural influences.

5.2.3 Reconceptualization of culture with meme

After the conceptual comparisons between culture and meme, I will now try to accomplish the reconceptualization of culture with memes.

1. Redefinition of culture with meme

The confusion of the concept of culture comes from its generality. Covering the wide range from hot spicy Sichuan food to marital rape, from Scottish kilts to Confucianism, overly general conception like this is easily problematic. However, the distinction I have made between the materialized and unmaterialized memes might be helpful in attempting to clarify the confusion.

In his book *Culture in Plural*, de Certeau examines culture from several methodological and theoretical points of view, and, thanks to him, we can identify the following different interpretations and uses of the term of culture.⁴⁹⁰

1. The features of “cultivated” human beings, that is, corresponding to the model developed in stratified societies through a category that introduces its norms where it imposes its power.
2. A patrimony of “works” to be preserved or diffused.
3. The image, perception, or comprehension of a world belonging to a given milieu (rural, urban, Indian etc.) or to a time (medieval, contemporary etc.).
4. Modes of behaviour, institutions, ideologies, and myths that compose frames of reference and whose totality, whether it is coherent or not, distinguishes one society from another.
5. Things acquired, insofar as they are distinguished from things innate. Culture leans in the direction of creation, artifice, and operativity in a dialectic that is opposed to it and combines it with nature.
6. A system of communication, conceived according to models developed in theories of verbal language.

The substantial contents on the list do seem to be very different and therefore some people have suggested that we should not expect that all the elements of the definition of culture fall into a systematic order in which they are rationally related to one another. Even de Certeau himself says: “Nothing authorizes me to speak of culture. I have no credentials for the task.”⁴⁹¹

But given the meme as the substantial core of culture, we may be able to find all different forms of cultural elements are related with meme one way or another. And a definition of culture in a systematic order seems possible. I will approach de Certeau’s list in an order different from his, that is, 3, 4, 1, 2, 5, and 6.

3. “The image, perception, or comprehension of a world” is obviously the meme about the whole world, the core of the concept of culture. “Belonging to a given milieu or to a time” means the meme is widely accepted within a society (given milieu) or at a time, which reveals that the existence of the concept of culture usually relies on the external view from another society (another milieu) or from another time.

4. “Modes of ideologies” are still what I call memes, the inner core of culture. “Modes of behavior” are one form of materialization of memes. As discussed above, behaviors are materialized memes. “Modes of institutions” are the materialization of certain type of memes, the knowledge or perceptions about the human societies. “Modes of myths” are the materialization of another group of memes, which are

⁴⁹⁰ De Certeau, *Culture in Plural*, Minneapolis & London : University of Minnesota Press, 1997, p103.

⁴⁹¹ De Certeau, p123.

spoken out in the myths. “Frames of reference” and “totality distinguishes one society from another” again reveal the importance of external view to the concept of culture.

1. “The features of ‘cultivated’ human beings” are the materialization of another special group of memes, mainly about the manner of speech and behavior, which are accepted by people during the process of education. “Developed in stratified societies through a category that introduces its norms wherever it imposes its power” reveals not only the external view from different strata in a society but also memes’ function as norms for people’s behavior.

2. “A patrimony of ‘works’ to be preserved or diffused” is the materialization of the memes of the people in past seen from an external view by the people from a later time.

5. “Things innate” ought to be the physical things gifted by God and are different from memes, which are mental beings in the human mind. So, “things acquired, insofar as they are distinguished from things innate”, right reveal culture’s nature as memes. That “culture leans in the direction of creation, artifice, and operativity in a dialectic” is further evidence that culture in essence is memes, the mental beings in human mind.

6. Speaking and writing, as said above, are among the most important forms of memes’ materialization. “A system of communication, conceived according to models developed in theories of verbal language” is the tool for the materialization of memes or a form of memes’ materialization.

So far, I seem to have gathered up the threads, through which different forms of cultural elements in de Certeau’s conceptual bran-tub of culture are related with each other. I seem to have found in the concept of culture two ingredients organized following two principles.

The two ingredients are:

1. Memes, that is, the unmaterialized memes, which are the mental beings inside human mind and also the core of the concept of culture.
2. Materialized memes, which are physical objects, actions, attitudes, etc.

The two organizing principles are:

1. External view: only when different societies with different memes exist and when people view externally from another society upon the different the memes and their materialized forms, can they have the concept of culture.
2. Classification of materialized forms: materialized memes are put into smaller groups and some of these specific small groups are named as culture by people.

Instead of simply piling up a list of things that are usually called culture, my definition seems to at least find out the common essence of and the principles to organize different kinds of elements into the concept of culture. Thus the definition does demonstrate a more systematic and logic order.

2. Relocation of influence-exerting cultural elements on law

If the above definition has clarified some vagueness of the concept of culture, relocation of influence-exerting cultural elements aims to clarify more vagueness of culture approach in legal studies. Do all cultural elements exert influence on law? If so, what influences do hot and spicy Sichuan food have on marital rape law? If not, what cultural elements exert influence on law and on what branches of law? To completely eliminate the vagueness of current culture approach in legal studies, we need to be more precise.

To achieve this goal, the memetic approach seems to be the only choice available. Why memetic approach is helpful here is again because of its special understanding of the concept of the problem of life as the influence-exerting mechanism of culture on law. Since the problem of life is the mediator for cultural elements to have relations with law, therefore, any cultural elements, if to be influential, must generate some problems of life that need law as their solutions. That is, if a cultural element or a meme, when combined with certain natural events or facts, generate a problem of life, and the problem of life needs a certain law as its solution, which means it has also become a problem of law, then this cultural element is influential on law, which means this specific cultural element exerts influence on this specific law.

For example, the cultural elements concerning women's status, like some parts of Confucian ethics or the modern value of gender equality, are the memes, when combined with natural facts of marital coercive sex, to decide whether marital rape exists or not as a problem of life, which is essential for marital rape as a problem of law. Therefore Confucian ethics and values of gender equality are the cultural elements that exert influences on marital rape law. In contrast, these memes don't combine with the natural actions of cutting down trees to generate problems of life and of law, therefore, they are not so influential on forest law. Or to be more specific, cultural elements like values of gender equality exert much less or virtually no influences on concrete problems of forest law. Memes of how to make hot and spicy Sichuan foods are of course also cultural elements. However, these memes are not so likely to combine with the natural actions of marital coercive sex to generate problems of life. Therefore, memes of hot and spicy Sichuan food are not so closely related with and exert much less or virtually no influences on marital rape law.

Thus, in the memetic approach, we don't talk generally about whether culture is influencing law. Instead, we can talk about which specific cultural element is influential on which specific problem in which specific branch of law. By doing so, the memetic approach has reached a much higher level of precision than culture approach. With such precision, we know that it is inappropriate to carry out general discussions about culture's influences on law. Cultural element *A* can be very influential on law *X* while at the same time totally irrelevant with law *Y*. Law *X* can be greatly influenced by cultural element *A* while at the same time has nothing to do with cultural element *B*. So, we have to be more precise in analyzing the influence of culture on law.

However some current culturalists, with their general and vague approach, seem to have misinterpreted the relationship between culture and law. Pierre Legrand for example emphasizes even the influences of the memes of French paintings on French law.⁴⁹² He mentions a painting by the French painter, Jacques-Louis David, depicting Napoleon in his study drafting the French civil code by candlelight. Legrand thinks the paintings offers to comparatists at least as much understanding of the French legal mind as any article of the French civil code: "In the way this painting illustrates the historically-conditioned relationship between the legislative and judicial powers in France, it tells the comparatist at least as much about the notion of judicial restraint that governs judicial behaviour in France today as does article 5 of the French civil code prohibiting judges from engaging in overt law-making."⁴⁹³

This painting is indeed law-related because Napoleon in the painting is studying the draft of the French code. However, in the painting-law relation here, it is the legal

⁴⁹² Legrand, "How to Compare Now", *Legal studies: The journal of the Society of Public Teachers of Law*, 16(2), p235.

⁴⁹³ Ibid.

memes materialized into the painting but not the other way round. Therefore it is that the legal memes are influencing the painting not that the memes of the painting are influencing law. An analogy can illustrate it better. If a religious painting depicting God delivering his Ten Commandments to Moses, the painting is indeed related to the Ten Commandments. However, it doesn't influence in any degree whatsoever the substantial contents of the Ten Commandments. This is the relation of David's painting with the French code. If we take all the law-related cultural elements as influencing law, we are being imprecise and vague, even fallacious.

However, Legrand seems to insist that the David painting also exerts influences on law: "This is because the David painting, and others like it, have helped to shape French minds within the legal community, and beyond, at least as much as what any provision of the civil code may have achieved, literally and symbolically."⁴⁹⁴ But, as to exactly *how* the French legal minds are shaped, *what* parts of the legal minds are shaped, *where* concrete effects of the shaping lie in law, Legrand does not say. He describes in very general, and vague terms the painting's influences on law as a cultural element. He does not go on with deeper and more precise study of the above questions because, I am afraid, he actually *cannot*. With artistic paintings' influences on law, Legrand is actually suggesting the influences of hot and spicy Sichuan food upon Chinese marital rape law. One can make such a general and vague claim, but it cannot be supported with concrete and precise studies. This is typical of general culture approach in legal studies. Instead of being analytical, logical or scientific, their interpretations of the relationship of culture on law are often general, vague and passionately exaggerative.

⁴⁹⁴ Ibid.

CONCLUSIONS

As a part of the effort to modernize Chinese law, Chinese legislators transplanted from the west the law of the criminalization of marital rape. But the legal transplant has run into problems in practice. The biggest problem we have found is the inconsistency between the legislative criminalization and the judicial decriminalization of marital rape. However, this inconsistency has been found not only in the present China but also in the early days of marital rape laws in western societies like England. We can explain the empirical findings if we assume the continuous existence of powerful cultural memes. Some of them favour the continuous decriminalisation of marital rape. Others could potentially facilitate future criminalisation of marital rape.

But once we have known the law's nature as memes, we know that the inconsistency in the present Chinese legal practice could be eliminated. We also know what we could do to promote the elimination of the inconsistency as well as the efficiency of the Chinese marital rape law. At the present stage, the legislative criminalization of marital rape is only the personal meme of some individual legislators but not accepted by a considerable number of members in the Chinese society. What this means is that the Chinese marital rape law is not recognized by this considerable number of people as legitimate "law" and therefore does not have its validity. So, the solution to the problem of Chinese marital rape law lies in the wider spread of the memes of the criminalization of marital rape to those who have not yet accepted so as to gain the law the validity in the society as a whole.

Though the legislative criminalization of marital rape is not yet a legitimate law, however, from the memetic view, it is already live memes, or replicators, which have the capacity to replicate themselves and spread to more minds. So, currently ineffective marital rape law may not yet well function to criminalize marital rape actions in practice but can well function to make *itself* effective in the future. This conclusion happens to conform to what some people call the model of "reflexive law". The term of reflexive law was first introduced by Gunter Teubner in 1982.⁴⁹⁵ One of the meanings of the word of *reflexive* here describes "an action that is directed back upon itself". In terms of law, reflexivity could be "making laws on law-making", "adjudicating on adjudication", or "regulating self-regulation". If a positive legal rule is made, instead of forcing itself upon the society, the rule takes effects through the communicative processes with the social systems. So reflexive law realizes the goal of lawmaking in a rather flexible and indirect way. It is "to design self regulating social systems through its norms of organisation and procedure which are centered around communications predicated on a code of legality and illegality which reproduce themselves as legal acts".⁴⁹⁶ As Professor Bankowski says, "Reflexive rationality does not seek to impose its structures on the institution it is regulating but seeks to bend to its logic to allow it to do what it wants. It does not try to identify and deal with social

⁴⁹⁵ G. Teubner, *Reflexive Recht*, ARCHIV FuR RECHTS-UND SOZIALPHILOSOPHIE, 1982, p. 13et seq.

⁴⁹⁶ Maher I: "Community law in the National legal order: A Systems Analysis", in 36 *Journal of Common Market Studies*, 1998, p241.

problems but rather creates 'opportunity structures' which do not destroy patterns of social life."⁴⁹⁷

In some degree, the legislation of Chinese marital rape law, though not well followed, well fits the model. The statutory law has criminalized marital rape, however, it is actually not imposing itself on the regulation of the problems it is supposed to regulate. Instead, the legislation is only working as an element that can influence the attitudes of common people or the judicial decisions of the judges. First the legislation provides for the victims who criminalize the actions of marital rape with the chance they did not have to start legal actions. Also the legislation brings the idea of the criminalization of marital rape to more people's minds and therefore increases the chance of their acceptance. Eventually the making of such a positive rule helps to improve the social conditions or provide better opportunities for the rule to be operative, resulting in the strengthening of the rule itself. What memetics adds to the reflexive model is that, from the memetic view, we can see the concrete implement of the reflexive process, the memes. The legislative criminalization of marital rape, decisions of the judges and the attitudes of common people are all memes. Though the memes of common people and the judges may not follow the legislation at the time being, however, through the memetic interaction, the legislative memes of the criminalization of marital rape are reproducing and spreading themselves, getting themselves better known and better accepted.

With this, the thesis could conclude its search for a solution to the ineffectiveness of Chinese marital rape law, which is to promote the quick spread of the memes of the criminalization of marital rape. One helpful way might be wide discussions about the problem of marital coercive sex. The discussions may let people to pay more attention to and think about the problem so that they can have their own opinions as well as know about different opinions. This will increase the chance for the memes of the criminalization of marital rape to be known and to be accepted. Public media, scholars and experts on law or sociology can make their contributions at this point.

There are two measures that can be taken by the courts. In the long run, the courts should explicitly adopt in their reasoning the criminalization of marital rape. In those marital rape cases that already now result in a conviction of the defendant, the courts should no longer pay lip service to the defendant's marital exemption. Thus the people can get the clear message from the courts about marital rape. In the medium term, emphasising "violence" over "intercourse" will establish a memetic link between an accepted offence element with an as yet problematic feature. As in the West, this can be eventually severed. As empirical data has shown, the courts are the most efficient carriers to spread marital rape memes. Such a message from the courts will greatly promote the spread of the memes of the criminalization of marital rape.

As data has also suggested, presently in Chinese society, most lay people would accept the criminalization of marital rape on the basis of the violence involved. Under such circumstances, it will be more convincing if the courts currently make violence involve the main ground for the criminalization of marital rape. The courts can also stress the abnormal marital status as a reason to criminalize marital rape because marital coercive sex taking place at this time is also easier for people to accept to be criminal. In contrast, the complete criminalization of marital rape based on the lack of consent is not yet able to be quickly accepted by society with the current state of mind.

⁴⁹⁷ Z. Bankowski, *Living Lawfully*, Kluwer Academic, 2001, p202.

From the memetic view, once the general impression is established, though on the ground of violence and abnormal marital status, it prepares the appropriate "soup" for the meme of the complete criminalization of marital rape based on the lack of consent. With the soup prepared, the final acceptance of the memes of complete criminalization will follow. The ineffectiveness of current marital rape law will then be eliminated. This memetic proposal well conforms to the actual evolutionary process of the marital rape law in England. It is also in accordance with the theory of reflexive law.

The above practical conclusions on policy owe thanks to the theoretical breakthroughs made earlier. The most fundamental notion is the conceptual transformation from culture to meme, which has brought a brand new view of the nature of culture and law's relation with culture. The general culture approach bases its methodology on a homogeneous concept of culture. People employing this methodology easily misinterpret the current cultural conditions for marital rape law in China by viewing cultural elements homogeneously. Those who support the criminalization of marital rape see only the modern notions of human rights and women's personal rights while those who oppose the criminalization of marital rape see only the traditional Chinese family ethics. Consequently, with such a picture of the cultural conditions, the general culture approach has caused the confusions about the inconsistency of marital rape law and the inevitable arguments about whether or not marital rape should be criminalized.

The memetic approach on the other hand bases its methodology on an individualistic concept of meme. With this individualism, the memetic approach gives a more precise picture of cultural elements concerning marital rape law in Chinese society. It covers not only the major groups of the high cultures quoted as Confucianism and human rights notions but also all the ideas and thoughts concerning marital rape that each human individual has in his/her mind. With this picture about cultural conditions, the memetic approach gets rid of the confusions about the inconsistency of Chinese marital rape law by interpreting it as the struggle of different memes, and gives its own suggestions about how to achieve effectiveness of marital rape law.

One of the special advantages of the memetic approach is that it sees the law also as memes in nature. In so doing, the relation between law and culture is no longer one between two entities of different nature. Instead, law/culture relation turns into the relation between different groups of memes. According to the memetic approach, cultural elements are memes, statutes are memes and judicial decisions are also memes. So what the memetic approach sees is not that the legislations as legal rules "seek to impose its structures on the institution it is regulating". Instead, it easily understand the so-called reflexive law model because the memetic approach can easily interpret as memetic interactions the communicative process in which legislative criminalization of marital rape as a meme communicates or interacts with memes of judicial decisions as well as the memes in lay people's mind of their attitudes towards marital rape. Such an interaction first changes the memes in the society and reflectively promotes the law at normative level. Thus, the memetic approach sees the dynamic nature of the Chinese marital rape law and has different suggestions for the law's future from that by the culture approach.

The new conceptual foundation, naturally, brings about some consequences in the theories of comparative law. With the individualistic concept of meme taking the place of the general concept of culture, we can find commonness of cultural elements

between the societies where overwhelming cultural differences used to be found. The newly found cultural commonness offers the key factor for the solution of the problem of incomparability of laws with strong cultural influences. Both the functionalist and the cultural approach in comparative law find themselves in a dilemma when attempting to compare culturally influenced laws, family law for instance. The reason for their problems is that the cultural elements, which influence the laws as the ontological foundations, are different. The differences in the cultural ontology thus have taken away the basic foundation for the comparisons of the laws. However, with cultural commonness within cultural differences found back, comparative law again has its essential foundations, on which laws with strong cultural influences like family laws can get rid of the problem of incomparability.

However, the most important contribution to comparative law might be the rediscovery of the concept of "the problem of life". In this thesis, "the problem of life" is no longer an insignificant phrase as Zweigert and Kotz mentioned indifferently when talking of some other important problems. Rather "the problem of life" is specially redefined here as the fundamental concept to explain the influence-exerting mechanism between culture and law. The problem of life so defined consists not only of the objective part, which is the physical action or event, but also the subjective part, which is the cultural element. Based on the individualistic view of the memetic approach, cultural elements become the atom-like units of memes so that they can be handily combined with the physical actions or events to form the problem of life. The meme constituent of the problem of life is known to some people as the normative meaning attached to or people's attitude towards the physical action or event, which is the objective constituent. Therefore, given the same physical action or event, different meme constituents, or cultural elements, will make different problems of life. And the law, as Zweigert and Kotz put it, are the solutions to the problem of life. Different problems naturally will need different solutions, which means the differences in law. Thus the memetic approach discovers the intermediate mechanism for cultural elements to exert their influences on law. This is the problem of life. Cultural elements exert their influences directly upon the problem of life, via which they exert further indirect influences upon law. But the problem of life is always the factor that exerts direct influences on law.

With the discovery of the influence-exerting mechanism, the memetic approach has answered the questions that the general culture approach has been unable to answer. Meanwhile, with the influence-exerting mechanism as the criteria, the memetic approach makes a special contribution in clarifying the vagueness in the relationship between culture on law. For example, with the problem of life, the memetic approach can well explain why family ethics and cooking skills are different in their relation with marital rape law though they are both cultural elements.

But we might find the biggest value of the concept of the problem of life in the question about the possibility of legal transplant, which is also essential to the Chinese marital rape problem. With his wide range of examples, Alan Watson is extremely optimistic about the easy success of legal transplant. With his emphasis on cultural influences, Pierre Legrand, on the other hand, thinks legal transplant is virtually impossible. The concept of the problem of life seems to be able to show where they are fallacious.

Many legal rules seem to be successfully borrowed into a different society and also operating fairly well. We always have to double check whether they are truly functioning to solve the same "problems of life" as in the original society before he claims them as successful legal transplants, as Watson observes. A legal transplant

can be said to be successful in strict sense only when the same positive rule is functioning to solve the same problem of life in a different society. Whether the problems of life are the same depends not only on the objective parts but also on the subjective parts, which are the cultural elements. If a borrowed rule is functioning to solve a different problem of life in the receptor society, we ought not to say it is still the same legal rule as the original one because it is already a different solution to a different problem of life. It follows that we cannot say it is a successful legal transplant. An analogy may well illustrate this. If a student on a tour sleeps on his friend's floor and asks for his friend's *The Chambers Dictionary* as a pillow for the night. Shall we say the student borrows a "dictionary" or a "pillow"? The question may lead to more interesting discussions that are beyond the reach of the thesis. But, with the problem of life's decisive effect on law, it is sufficient to show that Alan Watson's "out of context" doctrine is inappropriate.

Legrand is right in emphasizing the importance of cultural elements. But it is inappropriate for him to try to separate cultural elements from the concrete problems of life. Cultural elements do not exert influences on law as independent entities; instead, they are the constituents of the problems of life and influence law through the concrete problems of life. Legrand might need to check what problem of life a painting constitutes before he claims its influences on law. Cultural elements alone do not make legal transplant impossible. Legal transplant is impossible only when two societies do not share the same problems of life. Therefore, Legrand shall not try to make his cultural approach separate from or even antagonistic to the so-called functionalist approach. Actually functionalism and culturalism should not be separated at all but are an inalienable one.

Based on the memetic approach, functionalism and culturalism finally achieve their reunification in the concept of the problem of life. However, the memetic approach is not just trying to be a peacemaker between the two. The memetic conclusions flow naturally and necessarily out of their own conceptual foundation, which bring about not only some new theoretical thinking to the discipline of comparative law but also the practical policies to the Chinese marital rape law problem.

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Appendix I Survey Results in Beijing,

Shanghai and Guangzhou

From *First Hand Horizon*

Opinions of interviewees about whether marital rape exists as social fact	
	percentage
It exists.	70.7%
It doesn' t exist.	13.5%
I don' t know.	15.8%
	100

Opinions of interviewees with different marital status about whether marital rape exists as social fact		
	married	unmarried
It exists.	76.1	65.3
It doesn' t exist.	8.8	18.3
I don' t know.	15.2	16.4
	100	100

Opinions of interviewees with different educational levels about whether marital rape exists as social fact				
	Junior high school and below	Senior high, technical secondary and professional schools	Community college	University and above
It exists.	59.7%	68.2%	74.0%	83.8%
It doesn' t exist.	23.9%	15.4%	10.0%	3.4%
I don' t know.	16.4%	16.4%	16.0%	12.8%
	100	100	100	100

Opinions of interviewees in different cities about whether marital rape exists as social fact			
	Beijing	Shanghai	Guangzhou
It exists.	68.5%	77.5%	66.1%
It doesn' t exist.	12.2%	12.9%	15.5%
I don' t know.	19.3%	9.6%	18.4%
	100	100	100

Attitudes of interviewees with different marital status towards legal solutions of marital rape	
	percentage
Strong objection.	2.20%
Fairly against it.	8.30%
Medium.	13.90%
Fairly support.	32.10%
Strongly support	37.50%
It' s hard to say.	6%
	100.00%

Attitudes of interviewees with different marital status towards legal solutions of marital rape		
	unmarried	married
Strong objection.	2.1	2.3
Fairly against it.	5.1	11.5
Medium.	12.8	14.9
Fairly support.	29.5	34.7
Strongly support	45.5	29.6
It' s hard to say.	4.9	7
	100	100

Attitudes of interviewees with different educational level towards legal solutions of marital rape				
	Junior high school and below	Senior high, technical secondary and professional schools	Community college	University and above
Strong objection.	2.2%	2.2%	2.5%	2.0%
Fairly against it.	11.2%	8.8%	7.5%	5.4%
Medium.	20.1%	14.0%	11.5%	10.8%

Fairly support.	29.9%	32.2%	34.5%	30.4%
Strongly support	26.9%	36.2%	39.5%	48.6%
It' s hard to say.	9.7%	6.6%	4.5%	2.7%
	100	100	100	100%

Attitudes of interviewees in different cities towards legal solutions of marital rape			
	Beijing	Shanghai	Guangzhou
Strong objection.	3.2%	0.6%	2.8%
Fairly against it.	10.6%	6.4%	7.9%
Medium.	12.5%	13.2%	15.8%
Fairly support.	31.2%	27.7%	37.3%
Strongly support	34.1%	49.5%	29.0%
It' s hard to say.	8.4%	2.6%	7.0%
	100	100	100

Have you heard that the new Marriage Law will have special prescriptions about marital rape?		Percentage
Yes.		64%
No.		36%
		100

“Have you heard that the new Marriage Law will have special prescriptions about marital rape?” by age					
	18-19	20-24	25-29	30-34	35
Yes.	55.60%	61.90%	67.90%	68.10%	67.60%
No.	44.40%	38.10%	32.10%	31.90%	32.40%
	100	100	100	100	100

“Have you heard that the new Marriage Law will have special prescriptions about marital rape?” by city			
	Beijing	Shanghai	Guangzhou
Yes.	60.5%	70.7%	60.8%
No.	39.5%	29.3%	39.2%
	100	100	100

Appendix II Survey Results in Qingdao

City and the Rural Areas

1. SAMPLE OF THE QUESTIONNAIRE

(√Tick the right choice)

Sex: 1. Male 2. Female

Marital status: 1. Married(including divorced & widowed) 2. Unmarried

Age: 1. 18-25 2. 26-30 3. 31-40 4. 41-50 5. above 50

Education: 1. Illiterate 2. Primary school 3. Junior high 4. Senior high 5. University or above

Occupation: 1. Farmer; 2. Urban contracted employee; 3. Worker in state-owned enterprise 4. Student; 5. Teacher or technician or researcher 6. Businessman; 7. Doctor; 8. Soldier; 9. Public official; 10. Others ----- (Please indicate)

Permanent family location:

1. Coastal area 2. Inland provincial capital; 3. Medium or small sized city 4. County town 5. Village

Place you stay longest in the last three years:

1. Coastal area 2. Inland provincial capital; 3. Medium or small sized city 4. County town 5. Village

(√Tick the choice you think right)

1. In your opinion, if two people are legally married, sexual life is:

- (1). the inevitable result of marriage. No one should refuse the spouse unless he/she is physically ill.
- (2). not the necessary duty of marriage. One can refuse sexual life when he/she does not feel like it.

2. In your opinion, that the husband forces his wife to have sex without her consent:

- (1). never happens.
- (2) is very common in reality.
- (3). occasionally happens.
- (4). I don't know

3. In your opinion, the problem of coercive sexual life between husband and wife:

(1). whether serious or not, is personal privacy between husband and wife only and needs no external interference.

(2). if serious, could be settled within family with the help of senior members but not in the court.

(3). if serious, should be settled in the court.

4. Do you think special legal prescription is necessary or not for the husband's coercive sexual action against his wife?

(1) Yes.

(2) No.

5. In your opinion, if the husband forces his wife to have sex with him when she doesn't consent,

(1). now that it is against the wife's will, the action is essentially the crime of rape.

(2). though it is bad, the action is not illegal because of their legal marriage.

(3). the action is a kind of domestic violence and whether it is criminal or not should be decided on the specific circumstances or the seriousness of the case.

(4) nothing wrong with it

6. If the husband forces his wife to have sex, in which of the following cases do you think the action is criminal?

(1). As long as the wife says no.

(2). As long as the wife resists.

(3). Only when the wife is physically hurt.

(4). It never is.

7. If a wife accuses her husband of raping, as a bystander, you will:
- (1). Support the wife completely.
 - (2). Support the wife's application for divorce but not her accusation of rape.
 - (3). Think it is an absurd story and the wife is ignorant about law
 - (4). Sympathize with the husband, thinking that the wife is inhuman and treats her husband unfairly.
 - (5). Others: ----- (please indicate) .
8. The husband forces the wife to have sex, and the court sentences him for raping. What do you think of the verdict?
- (1) Reasonable;
 - (2) Unreasonable,
 - (3) Can't quite understand why the court made the decision.
9. The husband forces the wife to have sex, and the court finds him not guilty of rape. But the husband is punished based on ordinary domestic violence according to the specific circumstances. What do you think of the result?
- (1) Reasonable;
 - (2) Unreasonable,
 - (3) Can't quite understand why the court made the decision.
10. The husband forces the wife to have sex, and the court finds him not guilty of rape. Then the wife succeeds in applying for divorce. What do you think of the result?
- (1) Reasonable;
 - (2) Unreasonable,
 - (3) Can't quite understand why the court made the decision.
11. As for the question whether the husband's coercive sexual action against his wife is a crime or not, the opinion of which of the following people do you find the most trustworthy?
- (1).Government officials
 - (2).Senior family members
 - (3).Public figures or stars
 - (4).Academic scholars ;
 - (5).Judges or lawyers
 - (6).Others----- (please indicate).
12. Have you ever heard of the phrase "marital rape"?
- (1). Yes.
 - (2). No.

If you have heard of "marital rape", please go on with the following questions:

13. What is the source from which you heard about marital rape?
- (1). Television
 - (2).Newspapers or magazines
 - (3). The Internet
 - (4). Friends or people around
 - (5). Others : ----- (please indicate)

2. METHODS OF INVESTIGATION

In the city of Qingdao as well as the county town of Shenxian in Shandong Province, I adopted the random sampling approach by the means of both interviews and questionnaires. More specifically, I just picked up the people on the streets or in the parks, interviewing them and asking them to fill out the questionnaires. In the city of Qingdao, people usually understand Mandarin apart from their own dialect so there was no problem communicating. What's more, people in Qingdao usually have no problem to read and write. In most cases, I just gave them the questionnaires to fill in. And only in some special cases, the interviewees would need the piloting from the interviewers. Since I have a cousin working in the city with his wife, to whom I owe a lot of thanks, as I had expected, it wasn't that difficult a task for me to collect the 200 valid questionnaires needed within one week.

In the county town of Shenxian, what I specifically did was to set up a table by the side of the street, just like a newsstand, and offer some nice little gifts to attract people to participate in my investigation. I set up two tables, with distance in between, one for male and the other one for female. I trained my cousins, who were educated in universities, and my friends & relatives in my home village to work together to help with the interviews and the filling-in of the questionnaires. In Shenxian, we usually had to do more piloting than in Qingdao city due to the difference in education.

In the Pengzhuang village in Shandong and the two villages in Shanxi, I took all the available villagers aged over 18 as my objects. Since many of them were not highly educated, the interviewers usually interviewed every interviewees in person rather than just sending around questionnaires. But the interviewees were conducted in accordance with the questionnaire. The interviewers spoke out in dialects the questions and choices, then asked the interviewees to decide which choice was his/her answer to the question. So all the interview results would turn out to be questionnaires. As different dialects are spoken in the two provinces, I trained local people to be my interviewers. As marital rape is such a sensitive topic, especially to the female interviewees, interviews with females were always conducted separately by female interviewers. This is what is usually called in Chinese as "women's talk", and it turned out to be very efficient to let the female interviewees speak out their mind.

At this point, I owe special thanks to my wife, a smart and considerate woman, who studies law in Peking University. She offered her help on every aspect of my surveys. And her help was especially indispensable in the interviews with the female interviewees. She had not only helped with the training of the interviewers but had also interviewed many female interviewees herself. Moreover, Shanxi is her home province and it is because of our marriage that I have learned the dialect in Yongxing and Dachang villages while she has learned the dialects in Pengzhuang village and Shenxian county, the language skills of which had been essential in the success of the surveys.

As these are individually-conducted small-scale surveys, most questionnaires were filled in in person by the interviewees. Therefore there were no problems of response rates as in large-scale surveys. After I have decided the number of questionnaires I would plan to have from each place, I would work till I have had the number and then be satisfied. So, just as I have planned in advance, the data obtained from the surveys are 800 questionnaires, 200 from the medium-sized city of Qingdao and 600 from the rural areas. Among the 600 rural questionnaires, I have had 300 from the two villages in Shanxi and another 300 from the village and the county town in Shandong.

3. SURVEY RESULTS IN YONGXING & DACHANG

Questions	Choices	Count & percent
1. In your opinion, if two people are legally married, sexual life is :	(1).the inevitable result of marriage. No one should refuse the spouse unless he/she is physically ill.	113 37.8%
	(2).not the necessary duty of marriage. One can refuse sexual life when he/she does not feel like it.	187 62.2%
2. In your opinion, that the husband forces his wife to have sex without her consent :	(1).it never happens.	26 8.5%
	(2).it is very common in reality.	48 15.9%
	(3).it occasionally happens.	200 66.7%
	(4). I don't know	27 9.0%
3. In your opinion, the problem of coercive sexual life between husband and wife:	(1). whether serious or not, is personal privacy between husband and wife only and needs no external interference.	152 50.8%
	(2). if serious, could be settled within family with the help of senior members but not in the court.	27 9.0%
	(3). if serious, should be settle in the court.	120 40.2%
4. Do you think the special legal prescription is necessary or not for the husband's coercive sexual action against his wife?	(1) yes.	141 47.0%
	(2) no.	159 53.0%
5. In your opinion, if the husband forces his wife to have sex with him when she doesn't consent,	(1). now that it is against the wife's will, the action is essentially the crime of rape.	19 6.4%
	(2). though it is bad, the action is not illegal because of their legal marriage.	145 48.4%
	(3). the action is a kind of domestic violence and whether it is criminal or not depends on the specific circumstances or the seriousness of the case	136 45.2%
	(4) nothing wrong with it	0%
6. If the husband forces his	(1). As long as the wife says no.	30 10.1%

wife to have sex, in which of the following cases do you think the action is criminal?	(2). As long as the wife resists.	43 14.4%
	(3). Only when the wife is physically hurt.	190 63.3%
	(4). It never is.	37 12.2%
7. If a wife accuses her husband of raping, as a bystander, you will:	(1). Support the wife completely.	70 23.4%
	(2). Support the wife's application for divorce but not her accusation of rape.	121 40.4%
	(3). Think it is an absurd story and the wife is ignorant about law	53 17.6%
	(4). Sympathize with the husband, thinking that the wife is inhuman and treats her husband unfairly.	33 11.2%
	(5). Others: ----- ----- (please indicate)	22 7.4%
8. The husband forces the wife to have sex, and the court sentences him for raping. What do you think of the verdict?	(1) reasonable;	95 31.6%
	(2) unreasonable,	132 43.9%
	(3)can't quite understand why the court made the decision.	74 24.6%
9. The husband forces the wife to have sex, and the court finds him not guilty of rape. But the husband is punished based on ordinary domestic violence according to the specific circumstances. What do you think of the result?	(1) reasonable	197 65.6%
	(2) unreasonable,	72 24.0%
	(3)can't quite understand why the court made the decision.	31 10.4%
10. The husband forces the wife to have sex, and the court finds him not guilty of rape. Then the wife succeeds in applying for divorce. What do you think of the result?	(1) reasonable;	213 71.0%
	(2) unreasonable	68 22.6%
	(3)can't quite understand why the court made the decision.	19 6.5%
11. As for the question whether the husband's coercive sexual action against his wife, the opinion of which group(s) of the following people do you find the most trustworthy?	(1).government officials	10 3.2%
	(2)senior family members ;	32 10.6%
	(3).stars or public figures	6 2.1%
	(4).academic scholars ;	32 10.6%
	(5).judges or lawyers	213 70.9%

	(6).others----- <i>(please indicate)</i> .	8 2.6%
12. Have you ever heard of the phrase "marital rape"?	(1). Yes	149 49.7%
	(2). No.	151 50.3%
13. What is the source from which you heard about marital rape?	(1). Television	17 11.7%
	(2).newspapers or magazines	97 64.9%
	(3). The Internet	2 1.1%
	(4). Friends or people around	22 14.9%
	(5). Others : ----- <i>(please indicate)</i>	11 7.4%

4. SURVEY RESULTS IN SHENXIAN & PENGZHUANG

Questions	Choices	Count & percent
1. In your opinion, if two people are legally married, sexual life is :	(1).the inevitable result of marriage. No one should refuse the spouse unless he/she is physically ill.	156 51.9%
	(2).not the necessary duty of marriage. One can refuse sexual life when he/she does not feel like it.	144 48.1%
2. In your opinion, that the husband forces his wife to have sex without her consent :	(1).it never happens.	21 7.1%
	(2).it is very common in reality.	55 18.4%
	(3).it occasionally happens.	184 61.3%
	(4). I don't know	40 13.2%
3. In your opinion, the problem of coercive sexual life between husband and wife:	(1). whether serious or not, is personal privacy between husband and wife only and needs no external interference.	148 49.4%
	(2). if serious, could be settled within family with the help of senior members but not in the court.	39 12.9%
	(3). if serious, should be settle in the court.	113 37.6%
4. Do you think the special legal prescription is necessary or not for the husband's coercive sexual action against his wife?	(1) yes.	
	(2) no.	
5. In your opinion, if the husband forces his wife to have sex with him when she doesn't consent,	(1). now that it is against the wife's will, the action is essentially the crime of rape.	21 6.9%
	(2). though it is bad, the action is not illegal because of their legal marriage.	173 57.5%
	(3). the action is a kind of domestic violence and whether it is criminal or not depends on the specific circumstances or the seriousness of the case	107 35.6%
	(4) nothing wrong with it	0 0%

6. If the husband forces his wife to have sex, in which of the following cases do you think the action is criminal?	(1). As long as the wife says no.	3 1.1%
	(2). As long as the wife resists.	31 10.3%
	(3). Only when the wife is physically hurt.	183 60.9%
	(4). It never is.	83 27.6%
7. If a wife accuses her husband of raping, as a bystander, you will:	(1). Support the wife completely.	41 13.8%
	(2). Support the wife's application for divorce but not her accusation of rape.	124 41.4%
	(3). Think it is an absurd story and the wife is ignorant about law	52 17.2%
	(4). Sympathize with the husband, thinking that the wife is inhuman and treats her husband unfairly.	83 27.6%
	(5). Others: ----- ----- (please indicate)	0 0%
8. The husband forces the wife to have sex, and the court sentences him for raping. What do you think of the verdict?	(1) reasonable;	80 26.8%
	(2) unreasonable,	152 50.8%
	(3)can't quite understand why the court made the decision.	67 22.4%
9. The husband forces the wife to have sex, and the court finds him not guilty of rape. But the husband is punished based on ordinary domestic violence according to the specific circumstances. What do you think of the result?	(1) reasonable	178 59.3%
	(2) unreasonable,	96 32.0%
	(3)can't quite understand why the court made the decision.	26 8.7%
10. The husband forces the wife to have sex, and the court finds him not guilty of rape. Then the wife succeeds in applying for divorce. What do you think of the result?	(1) reasonable;	189 63.0%
	(2) unreasonable	96 32.0%
	(3)can't quite understand why the court made the decision.	15 5.0%
	(4)can't quite understand why the court made the decision.	15 5.0%
11. As for the question whether the husband's coercive sexual action against his wife, the opinion of which group(s) of the following people do you find the most trustworthy?	(1).government officials	0 0%
	(2)senior family members ;	0 0%
	(3).stars or public figures	0 0%
	(4).academic scholars ;	29 9.5%

	(5).judges or lawyers	260 86.5%
	(6).others----- <i>(please indicate)</i> .	12 4.1%
12. Have you ever heard of the phrase "marital rape"?	(1). Yes	131 43.7%
	(2). No.	169 56.3%
13. What is the source from which you heard about marital rape?	(1). Television	30 22.6%
	(2).newspapers or magazines	76 58.1%
	(3). The Internet	0 0%
	(4). Frie*nds or people around	30 22.6%
	(5). Others : ----- <i>(please indicate)</i>	4 3.2%

5. SURVEY RESULTS IN QINGDAO

<i>Questions</i>	<i>Choices</i>	<i>Count & percent</i>
1. In your opinion, if two people are legally married, sexual life is :	(1).the inevitable result of marriage. No one should refuse the spouse unless he/she is physically ill.	69 34.3%
	(2).not the necessary duty of marriage. One can refuse sexual life when he/she does not feel like it.	131 65.7%
2. In your opinion, that the husband forces his wife to have sex without her consent :	(1).it never happens.	7 6.5%
	(2).it is very common in reality.	11 10.2%
	(3).it occasionally happens.	80 74.1%
	(4). I don't know	10 9.3%
3. In your opinion, the problem of coercive sexual life between husband and wife:	(1). whether serious or not, is personal privacy between husband and wife only and needs no external interference.	59 29.6%
	(2). if serious, could be settled within family with the help of senior members but not in the court.	17 8.3%
	(3). if serious, should be settle in the court.	124 62.0%
4. Do you think the special legal prescription is necessary or not for the husband's coercive sexual action against his wife?	(1) yes.	174 87.0%
	(2) no.	26 13.0%
5. In your opinion, if the husband forces his wife to have sex with him when she doesn't consent,	(1). now that it is against the wife's will, the action is essentially the crime of rape.	28 13.9%
	(2). though it is bad, the action is not illegal because of their legal marriage.	15 7.4%
	(3). the action is a kind of domestic violence and whether it is criminal or not depends on the specific circumstances or the seriousness of the case	157 78.7%
	(4) nothing wrong with it	0 0%

6. If the husband forces his wife to have sex, in which of the following cases do you think the action is criminal?	(1). As long as the wife says no.	22 11.1%
	(2). As long as the wife resists.	31 15.7%
	(3). Only when the wife is physically hurt.	137 68.5%
	(4). It never is.	9 4.6%
7. If a wife accuses her husband of raping, as a bystander, you will:	(1). Support the wife completely.	113 56.5%
	(2). Support the wife's application for divorce but not her accusation of rape.	41 20.4%
	(3). Think it is an absurd story and the wife is ignorant about law	17 8.3%
	(4). Sympathize with the husband, thinking that the wife is inhuman and treats her husband unfairly.	13 6.5%
	(5). Others: ----- ----- (please indicate)	17 8.3%
8. The husband forces the wife to have sex, and the court sentences him for raping. What do you think of the verdict?	(1) reasonable;	140 70.1%
	(2) unreasonable,	24 12.1%
	(3)can't quite understand why the court made the decision.	36 17.8%
9. The husband forces the wife to have sex, and the court finds him not guilty of rape. But the husband is punished based on ordinary domestic violence according to the specific circumstances. What do you think of the result?	(1) reasonable	78 38.9%
	(2) unreasonable,	100 50.0%
	(3)can't quite understand why the court made the decision.	22 11.1%
10. The husband forces the wife to have sex, and the court finds him not guilty of rape. Then the wife succeeds in applying for divorce. What do you think of the result?	(1) reasonable;	160 79.6%
	(2) unreasonable	17 8.3%
	(3)can't quite understand why the court made the decision.	24 12.0%
11. As for the question whether the husband's coercive sexual action against his wife, the opinion of which group(s) of the following people do you find the most trustworthy?	(1).government officials	6 2.8%
	(2)senior family members ;	11 5.6%
	(3).stars or public figures	2 .9%
	(4).academic scholars ;	6 2.8%

	(5).judges or lawyers	167 83.3%
	(6).others----- <i>(please indicate)</i> .	9 4.6%
12. Have you ever heard of the phrase "marital rape"?	(1). Yes	161 80.6%
	(2). No.	39 19.4%
13. What is the source from which you heard about marital rape?	(1). Television	41 25.2%
	(2).newspapers or magazines	59 36.7%
	(3). The Internet	37 22.9%
	(4). Friends or people around	35 21.8%
	(5). Others : ----- <i>(please indicate)</i>	0 0%

6. CROSSTABULATION STUDIES

Question 1 in Yongxing and Dachang

		sex is the necessary result of marriage	sex isn't the necessary duty, refusable
male	% within gender	41.1%	58.9%
female	% within gender	33.3%	66.7%
Total	% within gender	37.8%	62.2%

Question 1 in Pengzhuang village and Shenxian

		sex is the necessary result of marriage	sex isn't the necessary duty, refusable
male	% within gender	48.5%	51.5%
female	% within gender	54.2%	45.8%
Total	% within gender	51.9%	48.1%

Question 1 in Qingdao

		sex is the necessary result of marriage	sex isn't the necessary duty, refusable
male	% within gender	26.8%	73.2%
female	% within gender	42.3%	57.7%
Total	% within gender	34.3%	65.7%

Question 3 by gender in Yongxing and Dachang

		it's always personal privacy between husband and wife only, which needs no external interference	settle within family before senior members but not in court	go to the court if necessary
male	% within gender	54.2%	5.6%	40.2%
female	% within gender	46.9%	13.6%	39.5%
Total	% within gender	51.1%	9.0%	39.9%

Question 3 by gender in Shenxian and Pengzhuang

		it's always personal privacy between husband and wife only, which needs no external interference	settle within family before senior members but not in court	go to the court if necessary
male	% within gender	51.5%	6.1%	42.4%
female	% within gender	46.0%	18.0%	36.0%
Total	% within	48.2%	13.3%	38.6%

gender		Question 3 by gender in Qingdao		
		it's always personal privacy between husband and wife only, which needs no external interference	settle within family before senior members but not in court	go to the court if necessary
male	% within gender	33.9%	8.9%	57.1%
female	% within gender	25.0%	7.7%	67.3%
Total	% within gender	29.6%	8.3%	62.0%

Education * nature of the action in Yongxing and Dachang

		it is the crime of rape, without her consent	it is not illegal though it is not good	common domestic violence, circumstances decides
illiterate	% within education		100.0%	
primary school	% within education	7.7%	69.2%	23.1%
junior high school	% within education	1.8%	50.9%	47.4%
senior high school	% within education	2.9%	45.7%	51.4%
university and higher	% within education	23.8%	19.0%	57.1%

Education * nature of the action in Shenxian and Pengzhuang

		it is the crime of rape, without her consent	it is not illegal though it is not good	common domestic violence, circumstances decides
illiterate	% within education		100.0%	
primary school	% within education		75.0%	25.0%
junior high school	% within education	5.1%	53.8%	41.0%
senior high school	% within education	6.7%	60.0%	33.3%
university and higher	% within education	18.8%	50.0%	31.3%

Education * nature of the action in Qingdao

		it is the crime of rape, without her consent	it is not illegal though it is not good	common domestic violence, circumstances decides
primary school	% within education		100.0%	
junior high school	% within education	33.3%	16.7%	50.0%
senior high school	% within education	10.6%	6.1%	83.3%
university and higher	% within education	13.3%	6.7%	80.0%

Marital status * nature of the action in Yongxing and Dachang

		it is the crime of rape, without her consent	it is not illegal though it is not good	common domestic violence, circumstances decides
married or divorce	% within marital status	6.2%	48.6%	45.2%
unmarried	% within marital status	16.7%	33.3%	50.0%

Marital status * nature of the action in Shenxian and Pengzhuang

		it is the crime of rape, without her consent	it is not illegal though it is not good	common domestic violence, circumstances decides
married or divorce	% within marital status	7.4%	58.0%	34.6%
unmarried	% within marital status			100.0%

Marital status * nature of the action in Qingdao

		it is the crime of rape, without her consent	it is not illegal though it is not good	common domestic violence, circumstances decides
married or divorce	% within marital status	13.8%	17.2%	69.0%
unmarried	% within marital status	11.9%	1.7%	86.4%