

**ABUSED WOMEN AND THEIR PROTECTION IN CHINA**

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**A THESIS SUBMITTED IN PARTIAL FULFILMENT OF  
THE REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS**

in

**THE FACULTY OF GRADUATE STUDIES**

**Faculty of Law**

**We accept this thesis as conforming to the required standard**

**THE UNIVERSITY OF BRITISH COLUMBIA**

**March 8 1999**

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## ABSTRACT

Violence against women, especially wife abuse, is a social problem that exists in almost every country in the world. China is no exception. Statistics show that wife abuse in present-day China is prevalent and serious. However, this social problem was largely invisible until the early 1990s. At present, it is still not recognized at the official level and there has been no systematic in-depth research on it to date.

North American feminists have long realized the seriousness of this issue and have since done a great deal of research with respect to the causes, prevalence and control of wife abuse. Their perspectives reflect the social reality in North American countries, but are they useful for other countries? This thesis tries to explore a feminist approach to the analysis of violence against women in the home in China's context, especially the lack of political will, which inevitably results in the failure of the criminal justice system to enforce the laws against wife abuse. The thesis tries to prove that violence against women in the home is a serious social problem in China that must be recognized and dealt with effectively. In order to control it, a sincere political commitment to deal with the problem is of paramount importance. The joint efforts of all social sectors, the criminal justice system in particular, are vital to guarantee gender equality in the private sphere.

The thesis considers western feminist theories with respect to violence against women in the home as a gendered issue and the impact of feminist perspectives on controlling wife

battery in western countries; investigates the dimensions and causes of wife abuse in China, demonstrating that this abuse is an unrecognized but serious social problem in China; explores the existing legislative protection of crime victims in China; analyzes the existing problems with the criminal justice system with respect to providing assistance to battered wives; discusses various reasons why the criminal justice system fails battered women in China, including the factors of state policy, women's federations, patriarchal ideology, mass media and social indifference, and gives suggestions on how to prevent and control spousal assault.

## TABLE OF CONTENTS

<b>Abstract .....</b>	<b>ii</b>
<b>Table of Contents .....</b>	<b>iv</b>
<b>Acknowledgments .....</b>	<b>vi</b>
<b>Dedication .....</b>	<b>vii</b>
<b>Introduction .....</b>	<b>1</b>
<b>Chapter One: North American Feminist Perspectives and the Criminal Justice System .....</b>	<b>7</b>
a) Feminist Theories on Women's Oppression .....	10
i) patriarchal ideology .....	10
ii) privacy ideology .....	11
iii) women's exclusion from the equal protection and benefits of law .....	12
iv) Battered Women Syndrome as admissible evidence .....	15
v) feminist critics of the use of mediation in wife abuse cases .....	24
b) The Impact of Feminist Perspectives on Criminal Justice Policy .....	27
<b>Chapter Two: The Dimensions of Wife Abuse in China and the Analysis of its Causes .....</b>	<b>32</b>
a) Wife Abuse in China .....	33
i) major forms of wife abuse in China .....	34
ii) the impact of wife abuse on women, children and the whole society .....	36
b) Major Catalysts of Wife Abuse in China .....	39
i) failure to produce a son .....	39
ii) means to force the wife to leave the marriage .....	42
iii) husbands' sudden wealth or women's diminished or sudden loss of income .....	43
iv) inadequate social support resources for battered women in China .....	47

<b>Chapter Three: The Protection Of Crime Victims in China .....</b>	<b>52</b>
a) Victim Protection in China .....	52
b) Existing Problems .....	58
i) problems in the legislation .....	58
ii) problems in law enforcement .....	61
<b>Chapter Four: Analysis of the Failure of the Criminal Justice System .....</b>	<b>67</b>
a) State Criminal Policy .....	67
b) Lack of Independent Women's Organizations .....	75
c) Patriarchal Ideology .....	78
d) The Media .....	84
e) Social Indifference .....	87
<b>Chapter Five: Suggestions and Conclusion .....</b>	<b>90</b>
a) A Strong Political Will Is Prerequisite to Prevent and Control Wife Abuse in China .....	92
b) Make Wife Abuse A Specific Offense in the <i>Criminal Law</i> .....	93
c) The Criminal Justice System Must Improve Its Law Enforcement .....	95
d) Raising Gender Awareness in Both Sexes Is Vital to Reduce Wife Abuse .....	97
e) The Role of the Media Should Be Brought into Full Play .....	99
f) The Use of Mediation Should Be Avoided in Wife Abuse Cases .....	101
g) International Expertise with respect to Changing the Justice System's Response to Wife Abuse Should be Sought .....	102
<b>Bibliography .....</b>	<b>107</b>

## ACKNOWLEDGMENTS

I would like to thank my supervisors, Professors Susan B. Boyd and Christine Boyle. They introduced me to feminist legal research and helped me to see the broad picture of the reality of women's lives. They have always been available and extremely supportive during my study at the University of British Columbia. Without their considerable assistance and timely encouragement, this thesis would have been an impossibility. I owe them a lot.

I would also like to express my deep appreciation to Ms. Eileen Skinnider, a researcher in the International Center for Criminal Law Reform and Criminal Justice Policy (ICCLR) at the University of British Columbia. She read my term papers and the draft thesis and provided me with helpful suggestions.

My thanks also go to other professors and friends who helped me during the past year, including Professor Marlee Kline for her skillful help in my pursuing the study of feminism, Professor Karen Mickelson for her support, Lillian Ong, Administrator of the Graduate Program, for her kindness and assistance and Dr. Vincent Yang, Director of China Law Program at ICCLR, for sharing his experience with me.

## **Dedication**

I dedicate this thesis to my dear parents, Wenda Chen and Jing Chen. They have shared my joys and hardships with me in all these years and have always been supportive in my pursuit of academic development.



## Introduction<sup>1</sup>

Violence against women is a violation of human rights.<sup>2</sup> It violates the inherent dignity and worth of all members of the human family, the inalienable right to freedom from fear and want, and the equal rights of men and women.<sup>3</sup> It disrupts social stability and hampers social development.<sup>4</sup> Violence against women is a global phenomenon and a serious social problem in both developed and developing countries. The 1997 UNICEF *Progress of Nations* reports that violence against women and girls is the most pervasive violation of human rights in the world.<sup>5</sup>

China acknowledges that "the elimination of all forms of violence against women is not only the requirement of consolidating and developing social stability in China, but also the

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<sup>1</sup> When I applied to study at UBC, my thesis proposal was "Criminal Justice and the Protection of Women's Rights in China". My interest was in violence against women in the public sphere at that time. However, it happened that one of my supervisors, Professor Susan B. Boyd, introduced me to the area of violence against women in the private sphere and gave me a list of books on wife-beating to read at the beginning of the first term. Before the end of that term, I decided that my thesis would be on wife-beating and criminal justice in China. I felt that wife-beating was a very serious but largely invisible problem in China and yet no one has done any in-depth research specifically on this subject.

<sup>2</sup> Michele E. Beasley and Dorothy Q. Thomas, "Domestic Violence as a Human Rights Issue" in Martha Albertson Fineman and Roxanne Mykitiuk eds., *The Public Nature of Private Violence* (1994), New York: Routledge, at 323-346.

<sup>3</sup> Preamble to *The Universal Declaration of Human Rights*. G.A. Res. 217 A (III) of December 10, 1948, New York: the United Nations.

<sup>4</sup> Jiang Wenjing, "On Statutes on Domestic Violence in terms of 'Regulations on Preventing and Controlling Domestic Violence in Changsha'", unpublished paper submitted at the *Seminar on the Prevention and Control of Domestic Violence* (Beijing, October 9-10, 1997).

<sup>5</sup> Charlotte Bunch, "The Intolerable Status Quo: Violence Against Women and Girls" in *The Progress of Nations Report 1997*, UNICEF, E. 97. XX. USA. 1, at 14.

requirement of protecting women's human rights and of promoting women's status in China."<sup>6</sup> While China has taken various measures in the past to combat violence against women, the main focus has been on violence against women by non-family members.<sup>7</sup> Violence against women in the home had been largely ignored until the Third World Women's Conference in 1985.<sup>8</sup> Since then, a number of surveys have been done both on a regional and national basis. The results show violence against women, especially violence against women by their husbands, is prevalent in present-day China.<sup>9</sup> These surveys also

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<sup>6</sup> Wang Yuqing, "Eliminating Violence Against Women, Protecting Women's Legal Rights and Promoting the Progress of Civilization in the Society" in Ma Yuan, ed., *Resolutely Combat and Eliminate Violence Against Women--Anthology of the Women Judges' Forum in the 4th World Women's Conference in Beijing* (1997), Beijing: The Publishing House of People's Court, at 18; Ji Kunmei, "Taking Various Measures to Combat and Eliminate Violence Against Women" in Ma Yuan, *ibid.* at 21.

<sup>7</sup> *China Women's News*, "Offenders Cruelly Injuring Women Deserve Capital Punishment", October 3, 1996, N2.

<sup>8</sup> Sun Xiaomei, "Causes and Control of Domestic Violence", unpublished paper submitted at the *Expert Workshop on Fighting Domestic Violence Against Women: Social Ethical and Legal Issues* (Beijing: October 29-31, 1997), at 42.

<sup>9</sup> For instance, Shanghai Women's Rights Protection Committee found that among 3899 cases it dealt with in 1992, 2399 (or 61.5%) cases involved wife abuse. (*China Women's News*, "Family Refuses Violence", September 9, 1996, N3). Among the 2399 wife abuse cases, 50 qualified as severe injury, 818 minor injury and 1644 very minor injury (*China Women's News*, "Nipping Disputes in the Bud", July 5, 1995, N3). Between 1993 and 1994, Sichuan Provincial Women's Federation received over 1000 domestic violence reports. Of these, over 50% are wife battery. (*China Women's News*, "Getting Rid of the Shadow of 'Violent Husband'", July 5, 1995, N3). In 1995, ACWF received 128900 letters from women requesting protection and 1600 (times) visits from women. Among them, 30% involved wife battery and is 30 times more than that of 1994 (*China Women's News*, "Strengthening Investigation and Research to Solve Problems", February 16, 1996, N1). Ma-Anshang Municipal Women's Federation received 414 reports of violence occurred among family members. Among them, 34 involved wife abuse by a husband or an ex-husband (*China Women's News*, "Family Matters can Be Dealt with Under the Law", February 2, 1996, N1). Statistics show domestic violence in China is increasing over the last ten years, especially in some provinces. The current statistics can only reflect 10% of the real situation, the remaining 90% is not reported due to the notion that "Family Disgrace Should not Be Aired in the Public", (*China Women's News*, "When the Autumn Wind Is Soughing", October 19, 1998, N3).

show that social support for abused women, especially in terms of women's shelters<sup>10</sup> or the protection from the criminal justice system, is inadequate.<sup>11</sup> Although laws and regulations exist to protect women from domestic violence, they are either not specific nor regularly enforced.<sup>12</sup> Hence the focus of this thesis.

My studies at UBC have exposed me to a variety of western feminist perspectives and feminist theories, which have helped me to analyze domestic violence in China in a critical way. Feminist theories analyze domestic violence as a gendered problem and believe it plays a role in women's oppression. In this thesis, feminist perspectives will be used to develop insights into issues relating to violence against women in the home<sup>13</sup> and as a theoretical approach to generate questions, analyze them and draw conclusions.

Due to the fact that there are, to my knowledge, almost no books focusing specifically on wife-battery in present-day China, the research in this paper relies largely on reports by the media, and papers presented at conferences on violence against women in China in recent

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<sup>10</sup> There is probably only one women's shelter in the city of Wu Han compared to China's 0.6 billion female population. See Chuan Renyan, "Overshadowing Feminism: on the Women Conference" in *China Rights Forum: The Journal of Human Rights in China* (Winter 1995) 16 at 16.

<sup>11</sup> *China Women's News*, "Social Consensus: Domestic Violence Is not A Private Matter", February 16, 1996, at 1.

<sup>12</sup> Chuan Renyan, *supra* note 10.

<sup>13</sup> For the purpose of this thesis, wife beating/abuse/battery/assault, domestic violence, violence against women in the home/family are used interchangeably to refer to violence inflicted on a woman by her husband.

years. The materials used in this thesis are from Chinese national law journals, such as Legality Monthly (Fa Zhi Yue Kan), Democracy and Law (Ming Zhi Yu Fa Zhi) as well as Legal Daily (Fa Zhi Ri Bao), found in the Asian Law Collection at UBC Law Library and other provincial dailies obtained from China. This thesis relies especially heavily on information and statistics reported in *China Women's News*,<sup>14</sup> which is affiliated to and sponsored by the Beijing-based All China Women's Federation ( hereafter ACWF)<sup>15</sup> and is

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<sup>14</sup> *China Women's News* is a newspaper that focuses on reporting issues concerning women. However, it never mentioned the concept of "domestic violence" in any of its reports or articles before 1991. It was the International Family Year in 1994 and the World Women's Conference that was to be held in 1995 that encouraged this newspaper to further its exposure of the domestic violence situation in China. On February 18, 1994, *China Women's News* started a Column for International Family Year and reported for the first time domestic violence on a whole page and from then on, violence, especially wife abuse, became a frequent topic in this paper. (*China Women's News*, "The Media Has the Responsibility to Eliminate Domestic Violence", October 22, 1998, N3; *Ibid.* "The Role of *China Women's News* in Protecting Women's Rights Cannot Be Replaced", October 5, 1998, N1.)

<sup>15</sup> Established in March 1949, ACWF is the largest in China among the 5800 non-government women's organizations. It is supposed to act as the bridge and tie between the Chinese Communist Party, the People's Government and women. It keeps the government informed of women's views and the issues women face as well as makes recommendations on possible solutions. ACWF has an extensive network over the country. Its policy is to unite and educate women, to carry out the Party's basic line, to protect women's legal rights and promote women's liberation. The major tasks of ACWF include: unite and encourage women to participate in reform, economic construction and in promoting social development; educate and guide women to heighten the sense of self-respect, self-confidence, self-dependence and self-improvement so as to raise women's quality (eg. more education, competence in job market, etc.); negotiate for women in social consultative dialogues, participate in democratic administration and supervision, participate in the drafting of laws, regulations and decrees that involve women (e.g. The Law on the Protection of Women's Rights and Interests in 1985), protect women's and children's legal rights; strengthen contacts with different social sectors and push them forward to do good things for women; consolidate and extend the unity of women from different ethnic groups and in all circles, promote the building of the Four Modernizations and the reunification of the country, actively develop friendship with women in other countries. The highest authority of ACWF is its National Women's Congress (NWC). NWC convenes every five years to decide on policy and tasks of the national women's movements and to amend the Charter of ACWF and to elect members of its Executive Committee. The ACWF Executive Committee implements NWC resolutions and discusses and decides major issues when NWC is not in session. However, women's federations lack independence from the government. They rely on the government financially and their staff at different levels enjoy the same treatment as civil servants in the government. See Liu Junhai & Yu Xingnian, eds. *320 Questions on How to Exercise and Protect Women's Rights* (1995), Beijing: The Publishing House of People's Court, at 14 -17; Woman Section of the All China Workers Union, *Introduction to the PRC Law on the Protection of Women's Rights and Interests* (1992) Beijing: China Workers' Publishing House, at 10.

commonly regarded as the highest authority on women's issues and gender equality. Other sources of information on wife abuse in China are legal and government documents, unpublished reports and conference papers, a few books on the criminal law and on gender equality, my interviews with two mediators with the people's mediation committees within the Andelu Neighborhood Committee and Chegouzhuang Neighborhood Committee respectively (both are Beijing Municipal model mediators in 1997), and my telephone conversations with two judges from the PRC Supreme People's Court.

The purpose of this thesis is to use a feminist approach to analyze the extent and causes of violence against women in the home in China's context, demonstrate that wife abuse is an unrecognized but serious social problem in China, identify various causes that bring about the lack of response from the criminal justice system, demonstrate that lack of sincere political will is the biggest obstacle in the prevention and control of this phenomenon and give suggestions for how to change this situation.

Chapter One discusses feminist theories on patriarchy, the public/private divide, the exclusion of women from the protection and benefits of law, the issue of Battered Woman Syndrome (BWS) as admissible evidence related to the defense of self-defense, and concerns relating to mediation in divorce cases involving violence. Countermeasures to prevent and control wife abuse in North America are also mentioned. Chapter Two presents a picture of the dimensions of wife-beating, presents the reasons behind it, followed by analysis of this social phenomenon. Feminist narrative methodology is used in

this chapter as a means to generate some insights into women's oppression.<sup>16</sup> Statistics are also used as a support for the picture. Chapter Three reveals the current legislative protection in China available to survivors of wife abuse and the problems existing in law enforcement in this area. Chapter Four critically analyzes the complex reasons why the Criminal Law and the criminal justice system fail to effectively protect battered women's personal rights in the home. This analysis is done in terms of state criminal policy, lack of independent women's organizations, ideology and society. Chapter Five gives conclusions and recommendations in relation to the necessary strategies to deal with wife abuse in China. These strategies include strong political will, criminal law reform, improved enforcement of the *Criminal Law*, gender awareness in both men and women, a positive role played by the media to stop and prevent wife abuse, exclusion of mediation on divorce involving violence and seeking international expertise with respect to changing the justice system's response to the control of wife abuse.

Although this thesis is a result of academic research, I hope to see its practical impact in bringing the true picture of wife-beating in China to light and portraying it as a social problem instead of a women's problem, so that the stories of battered women, the alarming statistics, and the research results can reach the general public in China and increase the awareness of the problem. Although one piece of literature won't change the situation, I hope to offer some insights to the issues, which could act as a catalyst for possible change.

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<sup>16</sup> Jane C. Murphy, "Lawyering For Social Change: the Power of the Narrative in Domestic Violence Law Reform" in *Hofstra Law Review* 21 (4) (1993) 1243, at 1259.

## Chapter One: North American Feminist Perspectives and the Criminal Justice System

This chapter provides a brief review of the history of the battered women's movement in North America and the development of feminist analysis of women's oppression with respect to wife abuse. Spousal assault in North America has often been analyzed in terms of its role in women's oppression both in the society and at home. Feminist perspectives recognize that "women view societal concepts and institutions from a different lens depending on women's consciousness and place in society",<sup>17</sup> because "women's perspectives differ from men's in reflection of their respective positions in the political and economic hierarchy and the social meanings attached to biological differences."<sup>18</sup> As wife assault is a gendered social problem, one useful way of analyzing it is to draw on feminist perspectives and treat it as a problem of gender. By situating ourselves in the perspectives of women affected in various ways and to various extents by legal rules and ideologies that are seemingly neutral and objective, feminist perspectives challenge and undermine dominant legal conventions and develop alternative conventions which take better account of women's experiences and needs, revealing various forms of women's oppression and

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<sup>17</sup> Charlotte Bunch, "Transforming Human Rights from A Feminist Perspective" in Julie Peters & Andrea Wolper, eds., *International Feminist Perspectives: Women's Rights, Human Rights* (1995) New York: Routledge, at 11.

<sup>18</sup> Susan B. Boyd & Elizabeth A. Sheehy, "Overview: Feminism and the Law in Canada" in T.C. Caputo et al, eds., *Law and Society: A Critical Perspective* (1989) Canada: Harcourt Brace Jovanovich, at 255.

calling for legal reform. Feminist perspectives help us understand the essence of the issue of wife abuse.

There are many different feminist perspectives to explain women's oppression, but this thesis will only discuss those that are deemed most relevant in the Chinese context. These include a) patriarchal ideology as the root of male violence against their wives; b) privacy ideology influencing the criminal justice system in its handling of wife abuse cases; c) women's exclusion from the equal protection and benefits of law; d) Battered Woman Syndrome as admissible evidence relevant to the defense of self-defense; and e) feminist critiques of the use of mediation in wife abuse cases. The impact of feminist perspectives on the criminal justice policy on wife battery is also discussed at the end of this chapter.

The battered women's movement in North America started 20 years ago. By sharing their stories of abuse and degradation in relationships, women have had their voices heard in the society.<sup>19</sup> Since 1974, the ongoing struggle of the battered women's movement has been to name the hidden and private violence in women's lives and declare it to be a public issue.<sup>20</sup> Great changes have taken place since then. Women's groups and organizations have emerged to assist battered women. Their activities include founding women's shelters,

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<sup>19</sup> Anne E. Menard, "Combating and Eliminating Violence Against Women" in Ma Yuan, ed., *supra* note 6, at 319.

<sup>20</sup> Elizabeth M. Schneider, "The Violence of Privacy" in Martha Albertson Fineman and Roxanne Mykitiuk, eds., *The Public Nature of Private Violence* (1994 ) New York: Routledge, at 36-58; Elizabeth Comack, *Feminist Engagement with the Law: the Legal Recognition of the Battered Woman Syndrome* (1993) Ottawa: CRIAW/ICREF, at 5.



setting up hotlines, challenging police practices that fail to provide protection to battered women and working to advance legislation that offers legal remedies for battered women.<sup>21</sup> Today, there is increased public awareness with respect to these social problems. Almost all states in the United States now have domestic violence legislation providing for orders of protection for women and legal sanctions for their violation and criminal remedies for battering.<sup>22</sup>

Feminist research on women's oppression in society, family, and law has developed over the years and provided various theories in analyzing this oppression. For example, with the recognition of the limitations of formal equality, more approaches to substantive equality have developed. These include result equality feminism, socialist feminism and radical feminism. The result equality approach shows that "equal application of a male-oriented legal system cannot drastically alter women's disadvantaged position" and that "feminist strategies should be gendered" in order to bring about the equality of result.<sup>23</sup> Meanwhile, Marxist and socialist feminist analysis regard "gender and class relations as inextricably linked but neither set of relations is prioritized as the primary oppression for women".<sup>24</sup> Radical feminist analysis "locates women's oppression in patriarchy---a systematic

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<sup>21</sup> Elizabeth M. Schneider, *ibid.* at 41.

<sup>22</sup> Peter Finn, "Statutory Authority in the Use and Enforcement of Civil Protection Orders Against Domestic Abuse" in *Family Law Quarterly* 23 (1989) 43, at 60-73.

<sup>23</sup> Susan B. Boyd & Elizabeth A. Sheehy, *supra* note 18, at 257-258.

<sup>24</sup> *Ibid.* at 258-260.

expression of male domination and control over women which permeates all social, political and economic institutions".<sup>25</sup> There are also feminist analyses of law and ideology<sup>26</sup> and of law and the state.<sup>27</sup> Although there is a broad range of feminist theories which cover the analysis of women's oppression in the home and in the society, discussions in this thesis will be limited to those that are particularly useful with respect to wife abuse in China's context.

#### a) Feminist Theories on Women's Oppression

##### i) patriarchal ideology

Radical feminist approach has been influential in developing an analysis of how patriarchal ideology operates in law. It locates women's oppression in patriarchal ideology which permeates all social, political and economic institutions. It argues that the male desire for supremacy is the motivating force of patriarchy.<sup>28</sup> Feminist legal analyses focus on

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<sup>25</sup> *Ibid.* at 261-262.

<sup>26</sup> Caroline Ramazanoglu, *Feminism and the Contradictions of Oppression* (1989) London: Routledge, at 146-149; Susan B. Boyd, "What is a 'Normal' Family? C v C (A Minor) (Custody: Appeal )" in *Modern Law Review* 55 (1992) 269; Shelley Gavigan, "Law, Gender, and Ideology" in Anne Bayefsky, ed., *Legal Theory Meets Legal Practice* (1988), Edmonton: Academic Printing and Publishing, at 283-295.

<sup>27</sup> Susan B. Boyd, "(Re)Placing the State: Family, Law and Oppression" in *Canadian Journal of Law and Society*, 9 (1994) 39; Davina Cooper & Didi Herman, "Getting The Family Right: Legislating Heterosexuality in Britain, 1986-1991" in *Canadian Journal of Family Law* 10 (1991) 41; Davina Cooper, "An Engaged State: Sexuality, Governance, and the Potential for Change" in *Journal of Law and Society* 20 (3) (1993) 257.

<sup>28</sup> Susan B. Boyd & Elizabeth A. Sheehy, *supra* note 18, at 260 - 262.

revealing the patriarchal nature of law and its oppressive impact on all women. Its central concerns include the ways in which the legal system extends male control over women's sexuality and lives, with violence against women reinforcing this control. It holds that patriarchy excludes or marginalizes women's values and priorities in legal structures and processes.<sup>29</sup> Law was created to protect male desire for hierarchy and control over women.<sup>30</sup> Thus there is a need to challenge the underlying assumptions about women that exist in law in order to make it work for women. This perspective is important because it operates as a lens that helps us see the underlying causes of wife abuse in Chinese society.

ii) privacy ideology

Feminist theories of the public/private divide assist in understanding the phenomenon of domestic violence and the failure of the criminal justice system to deal with such violence. The public/private dichotomy denotes the ideological division of life into apparently opposing spheres of public and private activities and responsibilities.<sup>31</sup> It draws a distinction between state regulation and family relations, with state viewed as public and with family viewed as private where the state has no responsibility.<sup>32</sup> Feminists suggest

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<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> Susan B. Boyd, "Challenging the Private/Public Divide: An Overview" in Susan B. Boyd, ed., *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (1997) Toronto: University of Toronto Press, at 7-8.

<sup>32</sup> *Ibid.* at 9.

this divide is "highly gendered in that men tend to prevail over women in the public spheres of politics and work", which inevitably gives them power in the private home/family.<sup>33</sup> This reduces women's ability to obtain compensation for their injuries or recognition of their housework.<sup>34</sup> A good example of this divide is the criminal justice system's failure to control violence against wives. Through the state failure to criminalize or prevent violence against women in the home, men were accorded significant "privatized" power by laws on marriage and family relations, which significantly impeded efforts to eradicate violence in the home.<sup>35</sup> Feminists believe that state should be held accountable for wife abuse because it fails not only to guarantee women's rights to life, liberty and security, but also fails to fulfill its obligations to prevent and punish violence against women in a nondiscriminatory fashion.<sup>36</sup> In this thesis, the public/private divide is used as a useful analytic tool for identifying dominant ideological views about abusive men and abused women and their relationships with the state in China.

iii) women's exclusion from the equal protection and benefits of law

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<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.* at 10.

<sup>35</sup> *Ibid.* at 13.

<sup>36</sup> Celina Romany, "State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law" in Rebecca J. Cook, ed., *Human Rights of Women: National and International Perspectives* (1994) Philadelphia: University of Pennsylvania Press, at 99.

A recurring theme in modern feminist legal literature is various forms of the exclusion of women from the equal protection and benefits of law. In her article: "What's Distinctive about Feminist Analysis of Law?: A Conceptual Analysis of Women's Exclusion from Law", feminist scholar Denise G. Reaume categorizes various exclusions into explicit and implicit ones.<sup>37</sup> The mechanism of women's exclusion from the design of the legal system or the application of law is sometimes legislative and sometimes judicial.<sup>38</sup> The aim of such exclusion is to keep women under the control of men and outside of the protection and benefits of the law.<sup>39</sup> Historically, women were excluded explicitly from certain public pursuits or participating in certain professions.<sup>40</sup> The legal rules excluded married women from the protection of property law and the right to enter into contracts, legal custodianship of their children and the right to recover for loss of consortium because of injury to a spouse.<sup>41</sup> Today, women's various explicit exclusions no longer exist in most jurisdictions, but implicit exclusions which effectively deprive women of the equal protection and benefits of the law continue to exist.<sup>42</sup> Implicit exclusion of women operates through seemingly neutral legislation that nonetheless operates on the basis of a male norm. This fails to take adequate account of women's different needs, interests and

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<sup>37</sup> Denise G. Reaume, "What's Distinctive about Feminist Analysis of Law?: A Conceptual Analysis of Women's Exclusion from Law" in *Legal Theory* 2 (4) (1996) 265.

<sup>38</sup> *Ibid.* at 272.

<sup>39</sup> *Ibid.* at 274.

<sup>40</sup> *Ibid.* at 275.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.* at 279-287.

social experience. Thus women are excluded from a) the design of legislation:<sup>43</sup> e.g. when the first Canadian *Unemployment Insurance Act* was passed,<sup>44</sup> it did not cover maternity leave. When maternity benefits were finally introduced, more stringent eligibility requirements were attached;<sup>45</sup> b) judicially defined doctrine:<sup>46</sup> e.g. prior to the Supreme Court of Canada's decision in *R. v. Lavallee*,<sup>47</sup> the courts had required that in order to justify the use of force in defending oneself, the harm feared by the accused must be imminent. The rationale was to ensure that the accused's actions really were necessary. However, this standard was made on the basis of an altercation between two men of roughly equal strength. Judges failed to see that in the case in which a man threatened to attack a physically less powerful woman, if she had to wait until harm was imminent in order to repel it, she was unlikely to be able to successfully protect herself. The requirement of imminent harm was thus based on the typical male experience of violent altercations, including both physical and social dimensions of that experience; c) the application of law:<sup>48</sup> e.g. in the trial judgment in *Lehnert v. Stein*,<sup>49</sup> the judge dismissed the plaintiffs' explanation of having a ride home with the defendant because he had their coat

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<sup>43</sup> *Ibid.* at 280-281.

<sup>44</sup> Cited by Denise G. Reaume, *ibid.* at 281.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.* at 281-284.

<sup>47</sup> [1990] 1 S.C.R. 852, 55 C.C.C. (3d) 97.

<sup>48</sup> Denise G. Reaume, *supra* note 46.

<sup>49</sup> (1963) 36 D.L.R. (2d) at 159.

checks and they felt under a social obligation to him because of the entertainment he had provided as "excuses". The judge did not see any cost to refusing such a ride. As such, the law excluded female experience.

iv) Battered Woman Syndrome (BWS) as admissible evidence

BWS as a legal concept emerged in the United States during the late 70s and early 80s.<sup>50</sup>

It is a combination of two theories, namely, the "cycle of violence" and "learned helplessness," that attempt to describe a pattern of behavior that women who are abused by their partners frequently exhibit.<sup>51</sup> This theory was firmly rooted in the work of psychologists and sociologists, especially the ground breaking work of psychologist Dr. Lenore Walker who identified a three-stage cycle of violence characterizing abusive relationships.<sup>52</sup> The first stage (tension building phase) involves a series of minor battering incidents. The batterer repeatedly expresses hostility and anger. The woman tries to placate the batterer in the vain hope that she may be able to prevent the violence from escalating. The tension gradually escalates until the second phase (acute battering incident) becomes inevitable. During the second stage, the batterer completely loses control of his anger and severely beats the woman. Research shows that the onset of phase two often

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<sup>50</sup> Elizabeth M. Schneider, "Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering" in *Women's Rights Law Reporter* 9 (3 & 4) (1986) 195, at 195.

<sup>51</sup> Lenore Walker, *The Battered Woman* (1979), New York: Harper & Row, at 55-70.

<sup>52</sup> *Ibid.*

has nothing to do with the battered woman, but is provoked by an external event or the internal state of the batterer. At the third phase (kindness and contrite loving behavior), the batterer's conduct changes from violence and anger to kindness and acts of love and contrition. He is caring and charming, begging the victim for forgiveness, and promises never to repeat his conduct. This provides the woman with positive reinforcement for staying in the relationship and assisting the batterer to work things out.

Dr. Walker's widely-known theory of "learned helplessness" helps to explain why women remain in violent homes. This concept developed from the work of psychologist, Martin Seligman, during the 1960s.<sup>53</sup> Mr. Seligman placed dogs in cages and administered electric shocks at random and variable times. At first, the dogs would jump from one side of the cage to the other. Over time, the dogs ceased all voluntary escape activity and instead developed coping skills to minimize the pains (such as lying on their faces) because they had learned there was nothing they could do to avoid the shock. This learned helplessness was said to consist of trading the unpredictability of escape for the more predictable coping strategies.<sup>54</sup> Dr. Walker applied this principle of learned helplessness to battered women. Repeated beatings, like electric shocks, seem inescapable to women in abusive relationships. Although these women initially believe they can control the violence by their behavior, they eventually recognize the futility of accommodating the abuse, or of

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<sup>53</sup> *Ibid.* at 42-70.

<sup>54</sup> Elizabeth Comack, *supra* note 20, at 44.



refraining from conduct that precipitates the violence. In this way, battered women come to believe that nothing they do can stop the violence, and eventually become passive and lose their ability to escape.<sup>55</sup>

In 1990, the Supreme Court of Canada, in *R. v. Lavallee*,<sup>56</sup> recognized the importance of admitting expert testimony on the "battered woman syndrome" as admissible evidence in the trial of women who pleaded self-defense after killing or assaulting their abusive mates. Angelique Lyn Lavallee was charged with the murder of her boyfriend Ken Rust. She was repeatedly beaten and threatened during their three or four years of relationship. She killed him one night after he had beaten her and threatened that he would "get her" when all the guests left if she did not kill him first. In great fear, Lavallee shot him in his back when he was leaving the room. She argued that she was acting in self-defense and so she should be acquitted of the offense.

At trial, her defense counsel introduced considerable evidence that Rust frequently beat Lavallee during their relationship. He also produced an expert to testify on BWS. The trial judge ruled that expert testimony on BWS was admissible. Lavallee was acquitted. The court of appeal ordered a new trial, the majority holding that the trial judge had

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<sup>55</sup> Michael Dowd, "Dispelling the Myths about the Battered Women's Defence: Towards a New Understanding" in *Fordham Urban Law Journal* 19 (1992) 567, at 573-574; Elizabeth Comack, *ibid.*

<sup>56</sup> [1990] 1 S.C.R. 852, 55 C.C.C. (3d) 97.

improperly admitted the expert evidence. The Supreme Court of Canada unanimously allowed Lavallee's appeal, holding that the expert's testimony was admissible.<sup>57</sup>

According to Madam Justice Wilson, who represented the majority opinion, expert evidence on the dynamics of abusive relationships and on the characteristics of battered women can perform two complementary functions. First, it can provide a framework in which the jury can meaningfully assess whether the woman's response in killing her batterer was reasonable under the Canadian *Criminal Code*.<sup>58</sup> This is critically important in establishing the availability of self-defense to the woman, since her actions in defending herself must be reasonable. Second, it can describe the phenomenon of wife battering to the jury and make it comprehensible to the jury why women who live in violent relationships simply do not leave their spouses. This is important to dispel common problematic images concerning battered women that may be held by judges and jurors. Without the benefit of expert evidence, a battered woman who pleads self-defense is at risk of being denied a fair trial. This is because generally the concept of self-defense is derived from a male norm and there are widely held myths regarding the phenomenon of both wife assault and battered women. The decision of the Supreme Court of Canada in *R. v. Lavallee* is an indication that there has been some progress in terms of gender equality in the sphere of criminal law since 1970.

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<sup>57</sup> *Ibid.*

<sup>58</sup> R. S. C. 1985, c. C-46.

As one of the effects of the recognition that evidence of BWS is admissible in relation to the defense of self-defense for a woman with a history of abuse from the man she has killed, the Canadian Association of Elizabeth Fry Societies (CAEFS), a national support group for women prisoners, lobbied the government in 1990 to review the cases of women convicted of homicide in these circumstances before the 1990 ruling.<sup>59</sup> They succeeded in 1995 when the federal government ordered a review to determine whether women imprisoned for killing their abusive partners should be freed or retried.<sup>60</sup> The government had concerns that these women may have been denied a proper defense.<sup>61</sup> Accordingly, the Honourable Lynn Ratushny, a judge of the Ontario Court of Justice was appointed to head an *en bloc* review in 1995.<sup>62</sup> Her tasks were:

---to review the cases of women under sentence in federal and provincial institutions who apply for a remedy and who are serving a sentence for homicide in circumstances in which the killing allegedly took place to prevent the deceased from inflicting serious bodily harm or death;

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<sup>59</sup> Judge Lynn Ratushny, *Self Defence Review: Final Report Submitted to the Minister of Justice of Canada and to the Solicitor General of Canada* (July, 1997); Dwight L. Gibson *et al*, *All About Law: Exploring the Canadian Legal System*, (4th ed.) (1996) Nelson Canada: I(T)P An International Thomson Publishing Company, at 144.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

---to make recommendations in appropriate cases to the Government of Canada  
for individual women whose circumstances merit consideration for the granting  
of royal prerogative of mercy;

---to clarify the availability and the scope of the defenses available to women  
accused of homicide in the circumstances set out above; and

---to make recommendations as considered appropriate with respect to  
possible law reform initiatives stemming from the review.<sup>63</sup>

After careful screening and interviewing fourteen women who were regarded to be eligible for relief, Judge Lynn Ratushny made recommendations for seven out of ninety-eight applications. Her recommendations include unconditional pardons for three women, remission for another three women and a s. 690<sup>64</sup> reference to the Court of Appeal for one

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<sup>63</sup> *Ibid.*

<sup>64</sup> c. 690. Power of minister of justice--The Minister of Justice may, on an application for the mercy of the Crown by or on behalf of a person who has been convicted in proceedings by indictment or who has been sentenced to preventive detention under Part XXIV, a)direct, by order in writing, a new trial or, in the case of a person under sentence of preventive detention, a new hearing, before any court that he thinks proper, if after inquiry he is satisfied that in the circumstances a new trial or hearing, as the case may be, should be directed; b)refer the matter at any time to the court of appeal for hearing and determination by that court as if it were an appeal by the convicted person or the person under sentence of preventive detention, as the case may be; or c)refer to the court of appeal at any time, for its opinion, any question on which he desires the assistance of that court, and the court shall furnish its opinion accordingly.

woman.<sup>65</sup> The federal government responded to her recommendations in 1997. It granted two conditional pardons and two remissions of sentence. The case that was recommended for a s. 690 reference was forwarded to the Court of Appeal on the question of whether there was mens rea.<sup>66</sup> Five women benefited from the project but no women were released from prison as a direct result of it.<sup>67</sup>

Professor Sheehy, a feminist criminal law scholar, has raised some concerns about the outcome of the Review.<sup>68</sup> However, in my view, it nevertheless is a success for CAEFS, given that the Review was unprecedented in Canadian law and practice, and had only the broad powers of the Crown's royal prerogative of mercy to support it, and given the "negative reactions and resistance" Judge Lynn Ratushny encountered from attorneys general and a "general attitude of resistance, distrust and apathy" she encountered from officials within the Department of Justice.<sup>69</sup> Legal reform can never be expected to be accomplished in one move. It is a long and gradual process. Therefore, although the outcome may not meet the intended goal of CAEFS, it paved the way for the contributions of the Review "to be mined in the future".<sup>70</sup>

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<sup>65</sup> Elizabeth Sheehy, "Review of the Self-Defence Review", forthcoming in *Canadian Journal of Women and the Law*.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

While some feminist activists and scholars regard the 1990 *Lavallee* judgment as a positive example of judicial sensitivity to gender difference,<sup>71</sup> it has also generated some controversy in this area. Feminist critiques on BWS suggest that women remained in abusive relationships not only for psychological reasons, but as well for numerous material reasons, such as financial insecurity, possibility of losing child custody, religious or personal values, lack of alternatives and a lack of any guarantee that violence would cease simply because they left.<sup>72</sup> Some feminists also argue that "learned helplessness" is inadequate in demonstrating the reasonableness of a battered woman's final violent act of self-defense -- if she is suffering from learned helplessness, why did she kill?<sup>73</sup> Feminists also argue that BWS fails to protect all battered women. The stereotypical characteristics may deprive some severely battered women of the right to self-defense because they do not fit into the "passive, submissive, helpless and dependent" model.<sup>74</sup> These arguments were also reflected by Judge L'Heureux-Dube J. in her concurring opinion in *R. v. M.*

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<sup>71</sup> Christine Boyle, "The Battered Wife Syndrome and Self-Defence" in *Canadian Journal of Family Law*, 9 (1990) 171, at 171; Michael Dowd, *supra* note 55, at 567-583; Jeffery Robinson, "Defense Strategies for Battered Women Who Assault Their Mates: State v. Curry" in *Harvard Women's Law Journal* 4 (1981), at 161; Elizabeth Comack, *supra* note 20, at 35.

<sup>72</sup> Alison M. Madden, "Clemency for Battered Women Who Kill their Abusers: Finding A Just Forum" in *Hastings Women's Law Journal* 4 (1993) 1, at 45; Martha Shaffer, "The Battered Woman Syndrome Revisited: Some Complicating Thoughts Five Years After *R. v. Lavallee*" in *University of Toronto Law Journal* 47 (1997) 1, at 11-12; Phyllis L. Crocker, "The Meaning of Equality for Battered Women Who Kill Men in Self-Defense" in *Harvard Women's Law Journal* 8 (1985) 121, at 133-134; Martha R. Mahoney, "Legal Images of Battered Women: Redefining the Issue of Separation" in *Michigan Law Review* 90 (1991) 1, at 40 - 49.

<sup>73</sup> Alison M. Madden, *ibid.*

<sup>74</sup> *Ibid.* at 48.

(M.A.).<sup>75</sup> Others critics argue that abuse does not give the victim license to respond with an act of violence.<sup>76</sup> By allowing the victim to successfully use abuse as justification for killing, it is argued that the courts have created a right out of two wrongs and it is the court's role to make laws work, not give approval for violations of them.<sup>77</sup>

I agree that psychological factors may not be the only reason for a battered woman to remain in an abusive relationship. I also agree that women who do not fit the stereotypical model of a battered woman may not benefit from BWS, but I don't agree that the theory of "learned helplessness" makes a battered woman's final violent action appear unreasonable. Before the violence reaches its accumulative point, being submissive may be the only way for her to be safe, but when she realizes that it no longer works, it is understandable for her to take desperate efforts. In fact, the purpose of both her submissiveness and violent act is to remain alive, due to a strong human desire to survive, as anyone else does. A Chinese saying can perhaps best explain this phenomenon: A cornered beast will do something desperate. When it becomes life or death, anything desperate a battered woman does to preserve her life or those she loves is reasonable.

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<sup>75</sup> (1998) 12 C. R. 207, 224 S. C. C. (5th).

<sup>76</sup> Dwight L. Gibson *et al*, *supra* note 59, at 144-145.

<sup>77</sup> *Ibid.* at 144 -145.

In my view, while recognizing that overreliance on BWS as an effective tool to secure acquittals is not adequate, expert testimony on BWS is still considered to have contributed to the acquittals or commutations of some of the battered women who kill. For example, in 1990, the Ohio Governor granted clemency to twenty battered women, including one on death row. In the following year, the Maryland Governor granted clemency to eight women. In both states, great importance was attached to the fact that these women had not had the opportunity at trial to present evidence of either BWS or a history of abuse.<sup>78</sup> Governors in other states followed suit on an individual basis and there were reports that clemency drives were under way in more than twenty states in the U. S. up to 1992.<sup>79</sup> Dr. Walker herself has done an effective job in her capacity as an expert witness: more than 25% of the defendants she has testified for were acquitted and "two-thirds have never served a minute of time in jail".<sup>80</sup> Again, because women come from different social and cultural backgrounds, it is almost impossible that anything should benefit women as a whole group. If the BWS as admissible evidence cannot protect all battered women who kill, it can result in acquittals or commutations for some.

v) feminist critics of the use of mediation in wife abuse cases

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<sup>78</sup> Alison M. Madden, *supra* note 72, at 4-5.

<sup>79</sup> *Ibid.* at 5-6.

<sup>80</sup> Lenore Walker, *Terrifying Love: Why Battered Women Kill and How Society Responds* (1989) New York: Harper & Row, at 327.



With the overcrowding of the courts creating a backlog of cases in many jurisdictions,<sup>81</sup> there is a need to seek methods of alternative dispute resolution. Mediation as a method of resolving family disputes has increasingly found favor with governments and court administrators, especially since the early 1990s, when there has been a strong pressure to save money spent on litigation, avoiding the possible delay and expense, as well as courtroom trauma.<sup>82</sup> In western countries, court-connected mediation programs were increasing; referrals from the court system to mediation were developing; community and neighborhood programs that deal with family disputes were growing and the number of private practitioners of mediation were also increasing.<sup>83</sup> However, as Australian scholar Hilary Astor wrote, there is a danger that mediation may downplay the prevalence of domestic violence. It seeks to re-establish the victim and the perpetrator's relationship, preserving the family for the sake of the children and society at large. Feminists have long since criticized mediation as a remedy for wife abuse. Mediation requires the parties to have some capacity for consensual decision-making, which abusers generally do not have as they are used to getting what they want from the target of their violence by way of violence or threats. Mediation requires the parties to sit down in the same room and negotiate, which often puts the woman, who has been the target of violence, in great fear. Where violence has produced a severe power imbalance, mediation is highly likely to

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<sup>81</sup> Family Law Council, *Family Mediation Report*, AGPS, Canberra, 1992, at 13-17; The PRC Ministry of Justice, *A Collection of Documents on the Third National Conference of People's Mediation* (November, 1993), unpublished, at 59.

<sup>82</sup> Family Law Council, *ibid*; Dwight L. Gibson *et al*, *supra* note 59, at 22.

<sup>83</sup> With respect to Australia, see Family Law Council, *ibid*; and with respect to Canada, see Dwight L. Gibson *et al*, *ibid*.

result in an agreement that is not fair.<sup>84</sup> This process basically asks the victims to share responsibility for the violence directed towards them. This approach requires them to modify their own behavior in exchange for the assailants' promises not to commit further crimes.<sup>85</sup> Although mediation of wife abuse cases may aid the justice system by disposing of a group of troublesome cases, this remedy may not be useful to protect victims from further violence.<sup>86</sup>

The exclusion of disputes involving violence from mediation has been recognized as quite important in recognizing the extreme imbalance of power between the parties which cannot be addressed by a mediator who is required to maintain a neutral and impartial position. Some jurisdictions, such as Australia, excludes disputes involving violence from mediation.<sup>87</sup> In the U.S.A. a report on domestic violence has stated that mediation should never be used as an alternative to prosecution in cases involving physical violence.<sup>88</sup> In the Canadian jurisdiction with which I am most familiar, British Columbia, diversion in cases

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<sup>84</sup> Hilary Astor, "The Weight of Silence: Talking About Violence in Family Mediation" in Margaret Thornton ed. *Public and Private: Feminist Legal Debates* (1995) Melbourne: Oxford University Press, at 179-180.

<sup>85</sup> United States Commission on Civil Rights, *Under the Rule of Thumb: Battered Women and the Administration of Justice* (1982), Washington, DC: The Commission, at 96.

<sup>86</sup> Lisa G. Lerman, "Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women" in *Harvard Women's Law Journal* 7 (1984) at 72.

<sup>87</sup> Hilary Astor, *supra* note 84, at 181;

<sup>88</sup> United States Commission on Civil Rights, *supra* note 85, at 96.

of violence against women in the family, is recognized as not appropriate, and the primary concern of the family court counselors is to provide women and children with assistance.<sup>89</sup>

#### b) The Impact of Feminist Perspectives on Criminal Justice Policy

Feminists have made important contributions to legal studies on domestic violence, especially in recent years. These studies have informed the reform of criminal justice policy and have made the criminal justice system more responsive to victims of domestic violence.<sup>90</sup> For instance, legislation has been enacted in most states in the United States, authorizing issuance of protection orders<sup>91</sup> and expanding police power to arrest the abuser in abuse cases.<sup>92</sup> The passage by the U.S. Congress of the *Violence Against Women Act*<sup>93</sup> shows the government of the United States recognized for the first time that gender-based violence constitutes a violation of women's civil rights.<sup>94</sup> The Act provides a significant increase in federal funding to enhance law enforcement and court system responses to domestic violence, secure funds for a Violence Against Women Initiative and

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<sup>89</sup> The B.C. Ministry of Attorney General: *Crown Counsel Manual: The Attorney General Policy on Violence Against Women in Relationships* (March 1993 and updated August 1996), at 20.

<sup>90</sup> Anne E. Menard in Ma Yuan, ed. *supra* note 6, at 325-327.

<sup>91</sup> Lisa G. Lerman, "Protection of Battered Women: A Survey of State Legislation" in *Women's Rights Law Reporter* 6 (4) (1980) 271, at 271-273 & 276-278.

<sup>92</sup> *Ibid.* at 274 & 280.

<sup>93</sup> *Violent Crime Control and Law Enforcement Act of 1994*, IV: Violence against Women, P.L. No. 103-322, 108 Stat. 103-322, in U.S.C. Congressional and Administrative News 2(1994) 103rd Congress.

<sup>94</sup> Anne E. Menard in Ma Yuan, ed., *supra* note 6, at 323-324.

gradually increases funding to support community-based services under the Family Violence Prevention and Services Act.<sup>95</sup> These federal level initiatives give the battered women's movement new tools and resources with which to continue and expand its work".<sup>96</sup>

In terms of law enforcement, more proactive investigation and charge policies have been adopted in many jurisdictions in North America.<sup>97</sup> The Ministry of Attorney General in the Province of British Columbia, in its Crown Counsel Manual, directs the justice system to emphasize the criminality of violence against women within relationships and has shown a strong commitment to a multi-agency, coordinated effort in responding to this social problem. It also emphasizes the need for arrest and rigorous prosecution of spousal abuse.<sup>98</sup> For example, police in the Province of British Columbia are required to give "spouse assault" calls and calls relating to violence within a relationship priority, to conduct a complete investigation in every case and to recommend a charge regardless of the desires of the victim.<sup>99</sup> Police in other jurisdictions who failed to offer protection to abused women which might have prevented subsequent violence have been sued in the

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<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

<sup>97</sup> Dianne L. Martin & Janet E. Mosher, "Unkept Promises: Experiences of Immigrant Women with the Neo-Criminalization of Wife Abuse" in *Canadian Journal of Women and Law* 8 (1995) 3, at 17; The B.C. Ministry of Attorney General, *supra* note 89, at 1-1 -- 2-22 & 8-1 -- 8-6.

<sup>98</sup> The B.C. Ministry of Attorney General, *ibid.* at 1-2 -- 1-3.

<sup>99</sup> *Ibid.*, at 1-5 -- 1-8.

past.<sup>100</sup> Crown Counsel in British Columbia are also required to carry out a proactive charge policy with respect to wife assault and to notify victims that they have no power to initiate or terminate criminal charges as the Crown Counsel does not represent any specific victim, but rather the wider public interest, while at the same time, striking an appropriate balance between the interests of the victim and the criminal justice system.<sup>101</sup> Many prosecutors in the United States have also adopted similar policies in wife abuse cases.<sup>102</sup> Research studies of the impact of these proactive policies over a period of ten years show that:

---The majority of victims say that the police and court process played a significant role in reducing or stopping violence against them in the home;<sup>103</sup>

---When it is the police, rather than the victims, who lay charges or arrest the abuser,

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<sup>100</sup> Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to dismiss, *Buckhannan v. Miami*, No. 80-14930 (Fla. Circ. Ct. march 30, 1981) (abused woman sued police for wrongful death because they failed to arrest her husband during two responses to her residence in one evening, and she shot him in self-defense because she has no other protection). This was cited by Lisa G. Lerman, *supra* note 86, at note 131. A check on the source of this case found that this file had been sealed after the active processing of it had terminated and it was closed/destroyed by the clerk of court in September 1993, leading one to suspect that the case was settled on terms that one or more of the parties wished to avoid publicizing.

<sup>101</sup> The B. C. Ministry of Attorney General, *supra* note 89, at 1-10 -- 1-16.

<sup>102</sup> Lisa G. Lerman, *Prosecution of Spouse Abuse: Innovations in Criminal Justice Response* (1981), Washington D.C.: Center for Women Policy Studies, at 33-36; Anne E. Menard in Ma Yuan, ed., *supra* note 19, at 325-327; Lisa G. Lerman, *supra* note 86, at note 132; Dianne L. Martin & Janet E. Mosher, *supra* note 97, at 17-18.

<sup>103</sup> Peter Jaffe *et al.*, *A Research Study to Evaluate the Impact and Effectiveness of the Policy Directive That Police Lay Charges in All Domestic Violence Incidents Where Reasonable and Probable Grounds Exist* (1985) Toronto: Provincial Secretariat for Justice, at 41.

the probability of repeated violence is cut in half,<sup>104</sup>

--- Police intervention greatly reduced the level of violence in most of the cases,<sup>105</sup>

--- Victims were more likely to experience new threats and/or assaults when charges were not laid than when they were.<sup>106</sup>

However, "mandatory arrest" and "no-drop charge" policies have generated a debate on whether they are in the best interest of battered women. Some feminists argue that these policies pay no attention to battered women's needs, interests and preferences and deny women's agency.<sup>107</sup> There are concerns that these policies could not provide actual safety for abused women.<sup>108</sup> Instead, they could deprive a battered woman of the right to make her own decision when she only wants the police to stop the violence without having her abuser charged.<sup>109</sup> There are also concerns that these proactive policies may prevent battered women from initiating contact with the police for fear of economic insecurity, fear of institutional surveillance or fear of bringing disgrace to family and community and/or fear of racial responses.<sup>110</sup>

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<sup>104</sup> *Ibid.* at 28.

<sup>105</sup> London Family Court Clinic, *Wife Assault as a Crime: The Perspectives of Victims and Police Officers on a Charging Policy in London, Ontario from 1980-1990*, April, 1991.

<sup>106</sup> Peter Jaffe *et al*, *supra* note 103.

<sup>107</sup> Dianne L. Martin & Janet E. Mosher, *supra* 97, at 37.

<sup>108</sup> *Ibid.*, at 35-37; Jennifer Koshan, "Sounds of Silence: The Public/Private Dichotomy, Violence, and Aboriginal Women" in Susan B. Boyd, ed., *supra* note 31, at 93-94.

<sup>109</sup> Dianne L. Martin & Janet E. Mosher, *supra* note 97, at 21-23.

<sup>110</sup> *Ibid.* at 24-40.

In my opinion, while these policies cannot provide protection to all those who need such legal assistance due to diversity, they are important at least to some battered women who want the police and prosecutors to arrest and charge their abusers. In this world, there is never anything that can meet the needs of all women as a group. If these proactive policies could help most, or at least half of the battered women in the society, they are better than nothing, especially when a-suit-all-women-policy is not available at the moment.

In this chapter, I have introduced feminist perspectives that are most relevant to the topic of the thesis, including patriarchal ideology, the ideology of public/private divide, women's exclusion from the equal protection and benefits of law, BWS as admissible evidence with respect to self-defense and feminist critiques of the use of mediation in wife abuse cases. I have also discussed their positive impacts on criminal justice policy in relation to reducing wife abuse and the concerns they have generated. In the next chapter, I will discuss several wife abuse cases to show the dimensions of domestic violence and analyze the current catalysts of this ugly social phenomenon in China in the 1990s.

## Chapter Two: The Dimensions of Wife abuse in China and the Analysis of its Causes

This Chapter turns to the extent of wife abuse in China and attempts to identify the causes of it. A number of real life stories about battered women are narrated showing the prevalence of wife abuse in China and the non-responsiveness of the legal system.<sup>111</sup> Although distressing, these stories are very important in a feminist legal perspective to the extent that they give "voice to suppressed perspectives", help "build a reservoir of alternative understandings through which existing practices can be criticized" and "enhance the chances of persuading people to act who currently are in a position to effect change".<sup>112</sup> As Jane C. Murphy pointed out, telling abused women's stories "does more to inform the reader or listener about the impact of gender bias on victims of domestic violence than abstract legal arguments, statistics, or the extensive research findings in social science literature."<sup>113</sup> Feminist narrative is chosen precisely because it reaches the reader in a way that logical argument cannot.<sup>114</sup> It causes the reader to rewrite her or his

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<sup>111</sup> These stories were reported in different legal newspapers and journals in China in recent years. Some of them were found in the Asian Law Collection at UBC Law Library and others are from media sources in China. As the stories were long and some of the details were quite brutal, they had to be abridged when they were translated into English.

<sup>112</sup> Martha Minow, "Words and the Door to the Land of Change: Law, Language, and Family Violence" in *Vanderbilt Law Review* 43 (5) (1990) 1665, at 1688.

<sup>113</sup> Jane C. Murphy, *supra* note 16, at 1276.

<sup>114</sup> Jeanne L. Schroeder, "Abduction from the Seraglio: Feminist Methodologies and the Logic of Imagination" in *Texas Law Review* 70 (1991) 109, at 117-118.



stock script, shift viewpoint and see new facets of familiar problems.<sup>115</sup> By recounting women's experiences in China, the intention is to disclose the hidden experiences of these abused women. This thesis uses these experiences to "set the scene" and provide the context for the rest of the thesis in an effort to show the severity and pervasiveness of the problem of domestic violence in present-day China,<sup>116</sup> and the critical need to find and enforce effective remedies.

#### a) Wife Abuse in China

Domestic violence and its scope in China has no unitary legal definition. Academics and judicial personnel have discussed this issue for a couple of years but so far no consensus has been reached.<sup>117</sup> Some define the scope to include only physical torture or injury of family members. Others refer to inflicting violent physical injury by one family member on other family members in order to make them submissive. Still others argue that any definition of domestic violence should include physical and psychological abuse.<sup>118</sup> Those who argue for a broad scope of the definition to include psychological abuse reflect the

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<sup>115</sup> Katherine Lusby, "Hearing the Invisible Women of Political Rape: Using Oppositional Narrative to Tell A New War Story" in *University of Toledo Law Review* 25 (4) (1994) 911, at 913.

<sup>116</sup> Although China is a big country with 56 nationalities, due to lack of research, this thesis will not deal specifically with women from different ethnic minorities.

<sup>117</sup> ACWF(All China Women's Federation), *Annual Report on Domestic Violence* (1997).

<sup>118</sup> ACWF, *ibid.* at 2. Sexual abuse is believed to be rare in China. Although domestic violence could involve sexual abuse, due to lack of statistical support, the majority opinion in this area has not yet included sexual abuse in wife abuse cases.

reality that physical abuse is always accompanied with psychological abuse, which can be more devastating than physical abuse itself. It is not controversial, however, that domestic violence refers to violent acts by one family member against another resulting in physical injury. It could happen between husband and wife, parents and children and between other family members in a broad sense. In China, it has been defined as violence occurring between a legally married couple.<sup>119</sup> In present-day China, one study has found that some 90% of violence between family members occurs between husband and wife, and women account for the majority of victims.<sup>120</sup> In fact, the percentage of wife-beating, including ex-wife beating, could be as high as 95% among all disputes occurring among family members that have been reported to women's federations in some provinces.<sup>121</sup> While recognizing that other women experience violence by their boyfriends and strangers, this thesis will limit its focus to wife beating.

#### i) major forms of wife abuse in China

Ms. Yao couldn't remember how many knife scars her husband Du had left on her body. During her four-year-marriage with him, she was many times tied up naked, had one of her

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<sup>119</sup> *Ibid.*

<sup>120</sup> *China Women's News*, "When the Autumn Wind Is Southing: Thoughts about the Issues of the Psychological Damage That Battered Women Suffer", October 19, 1998, N3; Ann D. Jordan, "Women's Rights in China", in *Journal of Chinese Law* 8 (1994) 47, at 92.

<sup>121</sup> *China Women's News*, "Various Circles Call for Combating Domestic Violence", January 9, 1996, N1; Jiang Wenjing, *supra* note 4, at 1.

thumbs cut off and one of her nipples cut, had her face twice scratched by a knife, was forced to take rat poison, forced to be injected with some home-made substance<sup>122</sup> to test her chastity, and forced to have "Love and Be Faithful to Du" tattooed on her bosom. On October 1, 1995, when a bloody Yao was taken to the emergency room of the local hospital, her right thumb and right nipple were missing, her spleen was ruptured, her duodenum, stomach, lung and kidney all had knife scars.<sup>123</sup>

Studies have found that the major forms of wife beating in China include beating and kicking, lashing, cutting, burning, disfiguring with boiling water or acid, maiming etc. Most battered women who finally go to women's and children's courts<sup>124</sup> are suffering

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<sup>122</sup> It is not known whether the substance was made by her husband or by her.

<sup>123</sup> *China Women's News*, "Women, You Must Not Be So Weak", January 24, 1996, N1.

<sup>124</sup> A women's and children's court is a tribunal located inside a women's federation, where cases are tried by female judges who work two days a week in this tribunal, together with people's accessories from women's federations. The first such court was set up in April 1995 in Shanxi Province. It handles civil and private actions which involve violations of women's and children's legal rights, where the female plaintiff must know clearly who she wants to charge, what are the facts and proof of the case, and what she wants to obtain from her legal action. The cases this court deals with include: a) marriage and family disputes which include wife battery, issues concerning child custody and violation of divorced women's remarriage freedom by their ex-husbands; b) violation of women's personal rights which include infringement of her body and name; c) violation of a woman's property rights which in most cases is the deprivation of her inheritance and property rights by her parents-in-law after her husband dies; and d) deprivation of maternal custody which in most cases involves the refusal of a woman's parents-in-law to let the woman leave her in-laws' family with her child after her husband dies. This kind of court is said to have been very helpful in protecting women's legal rights, especially when the violators are their family members. Apart from a few cases with aggravating circumstances, most cases are those not serious enough to be filed by the court but beyond the ken of mediation by women's federations (mediation is always used before a case of family dispute enters formal judicial process). Therefore, if the 1992 PRC Law on the Protection of Women's Legal Rights and Interests could be said to have filled in the gap in legislation in terms of gender equality, the establishment of the tribunal for women and children is regarded as "having filled the gap of judicial practice" (*China Women's News*, "Removing the Vacancy of the 'Protection of Women's Legal Rights'"; "Portrait-Making of Court for Women and Children in Shangxi Province", July 12, 1996, N2; "Looking for the Meeting Point of Protecting Women's and Children's Legal Rights", December 8, 1995, N3; Wang Shi Rong, "On the Organization, Characteristics, Application of Law and Social Significance of Women's and Children's Courts" in Ma Yuan, *supra* note

from serious injuries: some of them are suffering from kidney bleeding, ear perforation, diminished eye sight, broken nose, broken ribs, broken arms; others had part of the scalp pulled away, eyes blinded, or were burned to disfigurement.<sup>125</sup>

ii ) the impact of wife abuse on women, children and the whole society

Wife abuse is a crime against women. The harm to a battered woman includes physical and psychological damage.<sup>126</sup> Researches have indicated that battered women lack a sense of self-confidence and personal security. They tend to have low self-esteem, and can be in low moods, unsociable and dependent.<sup>127</sup>

When women are abused by their husbands, their children are also at risk. Witnessing violence against their mothers can put them at the risk of psychological injury.<sup>128</sup> Further, children can even become the target of direct and intentional abuse.<sup>129</sup> A family atmosphere characterized by wife abuse is full of tension, fear and intimidation. The many

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6, at 34-40; Zhang Qinghua, "A Pilot Project of Establishing Women's and Children's Courts Is Conducive to the Protection of Women's Legal Rights", unpublished paper, *supra* note 4, at 3-5.

<sup>125</sup> Wu Miaohua, "The Definition of Domestic Violence and Control Policy" in Ma Yuan, *supra* note 6, at 114; Huang Cuizheng, "Domestic Violence Needs Immediate Control: Analysis of Domestic Violence from the Perspective of Judicial Practice", unpublished paper, *supra* note 4.

<sup>126</sup> Zheng Zhaofang, "Combating against Wife Abuse and Patriarchy" in Ma Yuan, *supra* note 6, at 97; *China Women's News*, "Say 'No' to Domestic Violence", October 6, 1998, N1.

<sup>127</sup> *Ibid.*

<sup>128</sup> Mary Ann Dutton, "Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome" in *Hofstra Law Review* 21 (4) (1993) 1193, at 1211.

effects on children include difficulties in learning, socializing and establishing relationships, low self-esteem, feelings of guilt and a wide range of behavioral problems.<sup>130</sup> In addition, because abuse is a learned behavior, a family full of violence is the cradle for producing future abusive husbands and abused wives. Witnessing domestic violence affects the social development of children and convinces them that it is right for a husband to beat his wife and that violence is an acceptable method of dispute resolution.

According to the survey conducted by the "Women's Hot-Line" of the Women's Research Institute affiliated to the China Academy of Administration, the abused victims and abusers can be found in various cultures, professions, social sectors and they include people who are well-educated and who hold decent jobs.<sup>131</sup> The survey shows that among the victims, there are film directors, editors, journalists, engineers as well as government officials,<sup>132</sup> and among the abusers, there are professors, film directors, policemen, prosecutors and judges.<sup>133</sup> While some of them have graduate degrees, 1/3 of them are from rural families where the ideology of male superiority is deeply imbedded.<sup>134</sup> Growing

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<sup>129</sup> *Ibid.*

<sup>130</sup> The B.C. Ministry of Attorney General, *supra* note 89, at 2-2.

<sup>131</sup> *China Women's News*, "Family Is Not A Special Zone for Violence", January 31, 1996, N1.

<sup>132</sup> *China Women's News*, "Strange: Beating His Wife Does Not Affect His Promotion", January 18, 1996, N1; "Psychological Abuse, A Soft Dagger That Kills", January 23, 1996, N1.

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.*

up in such violent circumstances, it is no wonder these people believe violence is the only way to solve disputes.<sup>135</sup>

Violence against women is also a crime against society. It affects public security and social stability. Statistics show offenses of criminal injury caused by wife assault reported to women's federations and the criminal justice system have been increasing in recent years. There was a reported increase of 25.4% in 1993 compared to that of 1980s. Up to October 1994, there was another 4.7% increase.<sup>136</sup> Also, there are reports of wife murder. There was an average of one wife killed and two injured by their husbands every day in Hubei Province in 1995.<sup>137</sup> Spousal abuse can also bring about husband-murder. For instance, between 1988 and 1992, there were over 1300 offenders who were convicted of homicide. Of these, 21 were women in 1988 and after that the reported number increased at a rate of 22% every year.<sup>138</sup> Among the 1000 inmates in Liaoning Provincial Female Prison, over 100 women were convicted of husband-murder.<sup>139</sup> Also, in less than 3 years, there were 7 cases of husband-murder resulting from long and severe wife battery in Tieling County of Liaoning Province.<sup>140</sup> The increase of severe physical injury and murder

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<sup>135</sup> *China Women's News*, "Father-Murder", October 3, 1998, N3.

<sup>136</sup> *China Women's News*, "Let the Law Enter Your Home with Dignity", July 5, 1995, N3.

<sup>137</sup> *China Women's News*, "How Should Women Protect Their Own Rights", December 25, 1995, N1.

<sup>138</sup> *China Women's News*, *supra* note 136.

<sup>139</sup> *Ibid.*

<sup>140</sup> *Ibid.*

will inevitably affect the stability of the whole society and hinders its healthy development.<sup>141</sup>

b) Major Catalysts of Wife Abuse in China

Feminist analysis suggests that a number of factors contribute to violence against women in the family. In the Chinese context, the lack of the political will to control wife abuse contributes to the violence, creates a feeling of tolerance, and misleads the public that such abuse is socially acceptable behavior. There is also a lack of independent women's organizations that could represent women's voices. The long tradition of patriarchal ideology that a woman is only a piece of property of her husband and a means of reproduction is one of the main underlying causes. Further contributing factors include the persistence of the public/private divide in criminal justice policy and in society.<sup>142</sup> These factors are present in China, but there are also unique factors found in China that contribute to this phenomenon. The major catalysts of wife abuse in present-day China include the following:

i) failure to produce a son

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<sup>141</sup> *China Women's News*, *supra* note 126.

<sup>142</sup> These underlying causes will be explored in Chapter Four.

The tradition that one needs to have a son to pass down one's blood is deep-rooted in the minds of Chinese people. The status of a woman, in some Chinese families, depends largely on her child's gender. For over 2000 years, Chinese people have believed that the major purpose of marriage is to fulfill one's obligation to one's ancestors to pass down the family.<sup>143</sup> Although genetic science tells us that the sex of a baby is largely decided by its father, the traditional misleading view that the mother decides the baby's gender is still deeply rooted in some Chinese minds. Take myself for an example: when my son came to this world in 1986, my husband and his family were so happy that they treated me as if I were a "queen".<sup>144</sup> However, for women who are not so lucky the first time and cannot have a second child because of the "one child policy" in China,<sup>145</sup> this could trigger serious problems, especially in rural areas and among those who have less education.<sup>146</sup> Some

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<sup>143</sup> Cui Min & Zhang Jingfang, *The Punishment and Law in Ancient China* (1992) Beijing: Xinghau Press, at 49.

<sup>144</sup> My in-laws were not at all happy, however, when they learned my son has my last name. It was actually the result of a joke. During my pregnancy, my husband jokingly said that most likely I would bring him a daughter since my mother has two daughters only. I felt this was somewhat insulting to my mother and suggested a bet between us: if I won, our son should have my last name; if he won, our daughter should have his last name. I won and quickly registered my son as Gong Chen with relevant agencies before my husband could change his mind under great pressure from his parents and siblings. My son's last name remains unchanged because under art. 16 of the Marriage Law in China, a baby can either have its mother's last name or its father's last name. In the former case, the father cannot change the baby's last name afterwards without the consent of the mother.

<sup>145</sup> In an effort to control the explosive increase of population, China started to carry out a family planning policy since the early 1980s. The "One Child Policy" was adopted with the 55 minority ethnic groups in the country excluded. The policy successfully brought down the birth rate in China from 21.06 per thousand in 1990 to 17.7 per thousand in 1994. See *The Progress in China's Human Rights Cause* (1995), a white paper released by the Information Office of the PRC State Council, Beijing.

<sup>146</sup> Zheng Zhaofang, *supra* note 126.



women feel guilty, blaming themselves if they fail to produce a son.<sup>147</sup> There are even women who have committed suicide because they failed to give birth to a son.<sup>148</sup>

In China, some men still believe a wife is a tool of reproduction.<sup>149</sup> For instance, Zhang and her husband were farmers in Sichuan Province. He had a quick temper and frequently beat her. At New Year's Eve in 1981, they did not have good food to eat.<sup>150</sup> Looking at his four daughters, he blamed his wife who refused to bear any more children. He grabbed a stick and started to beat her. When he was tired, he asked his brother to come over to help. They tied her up and beat her in turn. Zhang was covered with cuts and bruises. Her lumbar vertebra was broken. She repeatedly begged: "Please stop beating". Nevertheless, she was pushed out of her house in that snowy night. One of her neighbors took pity on her and took her in. She hid in his house for 15 years. In early 1996, when her neighbor attended a public legal education meeting organized by the local court, he realized that Zhang could ask for a divorce. In March 1996, Zhang, a white-haired pale woman, appeared at the local court and told the court her painful story. Her divorce petition was granted, but her former husband was never charged with an offense as it had already

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<sup>147</sup> *China Women's News*, "Tragedy Occurred on A Rainy Night", 23 April 1996, at 4; *Wenzhou Evening News*, "There Is Such A Tragic Woman in Shaoguang City", June 23, 1998, N7.

<sup>148</sup> Li Yinghe, *Love and Sexuality of Chinese Women* (1998) Beijing: The Publishing House of China Today, at 302.

<sup>149</sup> *Ibid.* at 146.

<sup>150</sup> In China, New Year's Eve is the traditional occasion for family reunions and abundant delicious food.

passed its limitation period.<sup>151</sup> While what happened to Zhang is not very common in terms of the brutality of the abuse, it is not rare for a woman to be battered because of her failure to produce a son.<sup>152</sup>

ii) means to force the wife to leave the marriage

While wife-beating is usually used by the husband in order to keep the wife from leaving a marriage,<sup>153</sup> this kind of domestic violence can also be used as a means to force the wife into divorce when the husband develops an affair with another woman.<sup>154</sup> If the wife tries to stop him or refuses to be divorced either as a disguised revenge<sup>155</sup> or because she still

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<sup>151</sup> *Legality Monthly*, "Waking Up From A Nightmare: The Bitter Experience of A Contemporary White-Haired Woman", 2 (1997), at 18-20. Xue Ninglan, *Is It Bondage or Holy Bible -- Women and Law in China* (1992) Beijing: China People's University Press, at 148-149. Under art. 87 of the *PRC Criminal Law*, a person will not be charged if the offense has passed the limitation period. For example, if the maximum punishment for an offense is less than five years imprisonment, the prescription is five years from the time the offense is committed. If the maximum punishment of an offense is life imprisonment or capital punishment, the prescription is twenty years from the time the offense is committed.

<sup>152</sup> *China Women's News*, "Passing the Swamp", December 6, 1996, N1; *People's Court News*, "A Brutal Tragic Song", November 24, 1995, N4; *People's Public Security News*, "Tragedy Resulted from A Dream for A Son", February 27, 1993, N2.

<sup>153</sup> *Legal Daily*, "We Would Like to Hear Your Painful Story", March 8, 1995, at 7; *China Women's News*, "Why Did They Kill Their Husbands?", January 12, 1996, N1; "Domestic Violence Is A Neglected Area: Narrative by Xiao Ge", February 6, 1996, N; "Declaring War against Domestic Violence--Serial Reports from All over the Country", January 10, 1996, N1; "Passing the Swamp: Portrait of Women", February 24, 1996, N1.

<sup>154</sup> *China Women's News*, "Forensic Conclusion Is Used as Witness: Victims of Domestic Violence in Beijing Will Have Proof to Bring to Court", February 2, 1996, N1; "Visiting Shanghai Nanfang Women Shelter", February 6, 1996, N1; "Psychological Abuse: A Soft Dagger that Kills", January 23, 1996, N1; "We Should not Forget Those Wives Who Don't Have Household Residence Registration in the City", January 26, 1996, N1; "The Legal System Should Take 'Family Matters' Seriously", January 31, 1996, N1; Ann D. Jordan, *supra* note 120, at note 197.

<sup>155</sup> Some women hate their deviant husbands so much that it is not an uncommon practice for them to sacrifice themselves by staying within the marriage in order to prevent the husband from marrying his

loves him, the husband often resorts to violence.<sup>156</sup> According to the statistics from the Shanghai Municipal Women's Federation, wife abuse covers over 30% of all disputes occurring among family members and one of the reasons for wife abuse is that the wife refuses to leave her marriage when her husband wants to marry another woman.<sup>157</sup> Statistics have shown that using violence to force one's wife to agree to a divorce has become a major reason for wife beating.<sup>158</sup>

iii) husbands' sudden wealth or women's diminished or sudden loss of income

Taking advantage of China's economic reform policy, many Chinese easily and suddenly have become rich people. When a husband becomes the major bread-winner in a family, it is not uncommon for him to demand complete submission from his wife. For example, Wang married her husband in 1980. During the first three years of their marriage, life was fine. In 1983, when he started to earn a lot of money, a marriage red light<sup>159</sup> appeared.

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mistress, which is regarded as a punishment to the husband in the Chinese context because a man and a woman will be under great pressure from the society if they live together without a marriage certificate. *China Women's News*, "Declaring War against Domestic Violence--Serial Reports from All over the Country", January 26, 1996, N1.

<sup>156</sup> *China Women's News*, "Forensic Conclusion Is Used As Witness: Victims of Domestic Violence in Beijing Will Have Proof to Bring to Court", February 2, 1996, N1; "Visiting Shanghai Nanfang Women Shelter" February 6, 1996, N1; Yang Wei, "Research on Wife Abuse", unpublished paper submitted at the *International Seminar on the Judicial Protection of Women's Rights* (May 25-28, 1997).

<sup>157</sup> *China Women's News*, "Nipping Disputes in the Bud", July 5, 1995, N3; *Beijing Legal Daily*, "Looking at the Phenomenon of Violation of Women's Personal Rights by Their Husbands", January 2, 1995, N1.

<sup>158</sup> Wu Miaohua, *supra* note 125, at 116.

<sup>159</sup> In Chinese language, the phrase "red light" also means "warning signal".

Like many abusive husbands in China, her husband believed that since he became the major bread-winner in the family, he had the right to do anything he wanted and could treat his wife in whatever way he pleased. He physically and verbally abused her. He started gambling and having extra-marital relations with other women. When Wang tried to intervene, he got mad at her. On August 26, 1989, he threw an iron stool towards her head, knocking her unconscious. Medical records showed that her skull was broken and her brains flowed out. The doctors saved her life, but the left part of her body was paralyzed. Wang filed for divorce, but her husband begged her to stay and promised to wait upon her for the rest of her life. However, as soon as Wang came back home, he resumed his brutality. On April 12, 1991, he suspected that Wang was having an affair with a doctor. He beat and kicked her. He put a burning hook between her legs and into her private part, making her pass out. He resumed his brutality as soon as Wang came to. He even tore away part of her vagina, showed her the piece and trampled it. The torture lasted 3 hours. Forensic evidence confirmed that she suffered from severe bodily injury under 10(1), 35 and 46 of the *Forensic Standard on Physical Injury*.<sup>160</sup> He was convicted and sentenced to death on August 28, 1991. The sentence was reduced to life imprisonment at the appellate court.<sup>161</sup>

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<sup>160</sup> *Forensic Standard on Severe Physical Injury* was jointly issued by the PRC Ministry of Justice, the PRC Supreme People's Court, the PRC Supreme People's Procuratorate and the PRC Ministry of Public Security on March 29, 1990. It is used as a measurement for severe bodily injuries in criminal proceedings. See Shi Qingben & Meng Zhaoyang eds. *The Annotation of PRC Law, Regulations and Rules in the Public Security Area* (1997) Beijing: The Publishing House of China People's Public Security University, at 2099-2105.

<sup>161</sup> Xue Ninglan, *supra* note 151, at 149-151.

Women's diminished or sudden loss of income may be a factor underlying wife-beating. In China's context, a husband and wife are perhaps more likely to be equal when they earn more or less the same amount of money. It is when the wife is laid off or only gets a token income to stay at home that marriage trouble starts. Two recent surveys conducted respectively by Jingzhou City Court and by Jingzhou Local Women's Federation found that many laid-off women are either abused by their husbands or forced to leave their marriage due to a sudden decrease of family income.<sup>162</sup> In Daowai District in Harbin, a 1997 survey shows 1/4 women were abused by their husbands after these women were laid off.<sup>163</sup> This has become a common phenomenon that contributes to wife-beating, which often leads to divorce. Ms. Pee Xiaoming, a lawyer in Beijing, said up to 70%-80% of the divorce cases that she had handled were the result of wife abuse.<sup>164</sup> A district people's court in Harbin accepted and heard 434 divorce cases between January and June in 1994. Of these, 286 (or 66%) cases were triggered by wife abuse,<sup>165</sup> although wife abuse is not a ground for divorce under the *PRC Marriage law*.<sup>166</sup>

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<sup>162</sup> *China Women's News*, "Do Not Let Them Lose Their Jobs and Their Marriage at the Same Time", September 16, 1998, N2.

<sup>163</sup> *China Women's News*, "Getting Rid of the Shadow Brought by Family", April 25, 1995, N1.

<sup>164</sup> *China Women's News*, *supra* note 131.

<sup>165</sup> *China Women's News*, "The Protection of Women's Rights Is A Heavy Task and There Is A Long Way to Go-Report on the Implementation of The Law on the Protection of Women's Legal Rights in Heilongjiang Province", July 22, 1996, N2; "Sisters, You Should Go Ahead Bravely with the Law in Your Hand", April 12, 1995, N3.

<sup>166</sup> According to judicial interpretation, only when a judge is convinced of the "alienation of mutual affection" between a legally married couple can a divorce decree be granted.

China's drive to reform money-losing state industries<sup>167</sup> and to downsize bureaucrats will eventually make the issue of wife-beating more serious. China has decided to privatize 100,000 state-owned enterprises<sup>168</sup> and to cut the number of ministry-level bodies to 29 from 40, which is expected to throw half of the state's eight million bureaucrats out of work in 1998.<sup>169</sup> Up to early 1996, among the total population of 1.2 billion, China's official number of unemployment was 4.8 million and stay-in-the-pay-roll with token salaries 7.5 million.<sup>170</sup> Because of the fact that women consist of only 38% of the total number of workers<sup>171</sup> over the country, and because of the stereotypical roles of men and women in the private/public spheres, the number of women who were laid off or stayed at home with token salary could be twice as much as male workers.<sup>172</sup> In Qinghai Province laid-off women consist of over 60% of all laid-off employees while in Shuzhou city of Jiangsu Province, the number is 64%. Women in Jiayuguang city of Gansu Province amount to 87.4% of all laid-off employees.<sup>173</sup> Therefore, the target of most layoffs would be female workers.

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<sup>167</sup> *Vancouver Sun*, "China Cutbacks Come to Capital", 3 February 1998, D3.

<sup>168</sup> *Vancouver Sun*, "China's Nodding Congress Meets", 5 March 1998, A12.

<sup>169</sup> *Vancouver Sun*, "China Encourages Bureaucrats to Find Work in Private Sector", 25 March 1998, D3.

<sup>170</sup> *China Women's News*, "Gender Awareness and Policy-Making", 9 July 1996, N3.

<sup>171</sup> Although there are different laws and regulations that forbid discrimination against women, companies tend to lay off more female employees when they need to cut the number of the staff. Also, when companies need to hire new staff members, they prefer male workers.

<sup>172</sup> *China Women's News*, *supra* note 170.

<sup>173</sup> *China Women's News*, "How Far Is the Road to Gender Equality", December 25, 1996, N3.

Also, the government has designated the women-dominated textile industry as a model for restructuring, targeting 1.2 million employees from state-run mills—30% of the industry--to drop from the payroll during the next three years.<sup>174</sup> In Heilongjian Province, there were 2.2 million employees who lost their jobs in 1996; of whom 70% were women.<sup>175</sup> As China does not have a sound social welfare system and the government can neither afford to pay surplus employees nor pay them off, women will become more economically dependent on their husbands. One result will be that wife-beating as a social problem will probably get worse when China furthers its economic reform at the turn of next century.

iv) inadequate social support resources for battered women in China

Due to lack of government and non-government funds, social support resources for women facing wife abuse are rare in China. However, the Fourth World Conference on Women in Beijing in 1995 brought a significant level of awareness to this issue, with a great impact on China in many areas. Since the United Nations appointed Beijing as the host of the Conference, the media, especially *China Women's News*, started to expose and criticize violence against women in the family. Several women's hotlines and consultation

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<sup>174</sup> *Vancouver Sun*, *supra* note 167.

<sup>175</sup> *China Women's News*, "Gender Equality Needs Legal Guarantee", December 6, 1996, N1; "The Latest Report on the Current Situation of Laid-off Female Employees", December 10, 1996, N3.

centers were established.<sup>176</sup> However, these few resources have since either closed or are struggling to survive. Sponsored by the US-based Ford Fund, China's first domestic violence hot-line, established in Beijing on October 14, 1994,<sup>177</sup> closed in February 1996<sup>178</sup> due to lack of money. However, the Beijing Tong He Law Firm soon opened a legal hot-line for women afterwards.<sup>179</sup> Funded by Shanghai Zhiqing Shili Cooperation,<sup>180</sup> Shanghai Nanfang Shelter for Women and Children was established in January 1996 and within its two-month-pilot-operation had sheltered 21 battered women and answered 250 phone calls from abused women.<sup>181</sup> But it was forced to close in two months because no procedural rules were available to issue a license for such an institution.<sup>182</sup> It is not known at the present whether this shelter has received its license to renew its operation. Wu Han New Sun Women's Shelter, established in September 1995, provides assistance to women who wish to leave their violent marriages or who are divorced but are harassed by their

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<sup>176</sup> Human Rights in China, *Caught Between Tradition and the State: Violation of the Human Rights of Chinese Women--A Report with Recommendations Marking the Fourth World Conference on Women* (August 1995)(a special issue of *Human Rights in China*), at 30.

<sup>177</sup> *Legal Daily*, *supra* note 153.

<sup>178</sup> *China Women's News*, "The First Hot-Line of Domestic Violence in China Closed in Difficulties", February 6, 1996, N1.

<sup>179</sup> *Ibid.*

<sup>180</sup> The General Manager of this corporation, Mr. Zhang Zhiqing, whose mother was a mediator in a neighborhood committee, saw the pains and miseries many women suffered when he was a child. He explained: "I wanted to let abused women have a place to go when they need assistance so that domestic violence and its danger to them is reduced to the lowest possible extent. This is important because 2/3 women in Shanghai who jumped into Huangpu River to commit suicide did so because of family disputes and 30-50% of all the criminal offenses in Shanghai are triggered by family disputes". *China Women's News*, "Visiting Shanghai Nanfang Shelter for Women and Children", February 6, 1996, N1.

<sup>181</sup> *Ibid.*



abusive ex-husbands. It is the first and probably the only women's shelter existing in China.<sup>183</sup> However, due to lack of support from the government, Ms. Zhang Xian Feng, founder and sponsor of the Shelter, is herself threatened and sometimes assaulted by violent men whose wives or ex-wives are accommodated in this Shelter.<sup>184</sup> There is no guarantee that this shelter will continue to operate, especially if Ms. Zhang's personal security is threatened and local police refuse to provide help.<sup>185</sup>

It is perhaps worthwhile to mention briefly that there is an obvious regional difference regarding wife abuse in China. Men in the southern part and coastal areas of China seem to have more consciousness of gender equality and treat their wives much more equally while men from the northeastern part of China, namely, Jiling Province, Liaoning Province and Heilongjiang Province, tend to be dominant.<sup>186</sup> Many men from Shanghai Municipality are nicknamed "househusbands" for their active involvement in household chores and gender awareness. Men from Zhejiang and Jiangshu Provinces are called "Qiguangyen" (a man whose wife has the last say in the family or a man who is under the control of his wife). However, men from northeastern part of China are called "Dalaoyemen" (powerful

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<sup>182</sup> *China Women's News*, "Who Can Save the 'Holy Palace' for Women and Children?", April 19, 1996, N1.

<sup>183</sup> Chuan Renyan, *supra* note 10.

<sup>184</sup> *China Women's News*, "Who Can Protect the Director of the Shelter?" January 29, 1996, N1.

<sup>185</sup> *Ibid.*

<sup>186</sup> This phenomenon is also supported by the statistics from ACWF.

men at home). Men from Shangdong, Hunan and Sichuan provinces are known for their abusive behavior in the home.<sup>187</sup> These regional differences with respect to male violence in the northeastern part of China appear to be common knowledge in Chinese society.

However, due to lack of research, few people know the causes for this difference. There is so far no published research on it. According to my personal interviews with a dozen men and women who grew up in the northeastern part of China,<sup>188</sup> strong ideas of patriarchy and male superiority are deeply rooted in that area, because of the 14-year-occupation by the Japanese aggressors (1931 -- 1945). During that period, local schools were forced to teach the Japanese language and Japanese culture while Chinese language and culture were forbidden. As Japanese culture is known for its strong patriarchy and male superiority, people in these areas were deeply influenced. These ideas are not easily eliminated even today. Several interviewees also explained why men from Shangdong Province have a similar sense of women's inferiority: population flows to and from the northeastern part of China and Shangdong Province during the Japanese rule brought these unequal ideas about men and women to Shangdong Province, making men in Shangdong Province also feel their own superiority. More systematic research needs to be done in order to substantiate these speculations.

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<sup>187</sup> *China Women's News*, "Strengthening Investigation and Research to Solve Problems: Priority of Women's Rights Section of ACWF in Anti-Domestic Violence in 1996", February 16, 1996, N1.

<sup>188</sup> The interviewees are either my friends or my colleagues in Beijing.

This Chapter has illustrated that wife abuse is a serious and prevalent social issue in China. Also, it shows that social support for abused women is rare in this country. Why is it so? What about the legal protection for women's personal rights under the law? How does the criminal justice system in China respond to victims of domestic violence? The following chapter will answer these questions.

### Chapter Three: The Protection of Crime Victims in China

This Chapter reviews relevant legislation in relation to gender equality, focusing especially on threats to women's personal security. The existing problems both in the legislative regulations and in law enforcement in protecting women are reviewed and analyzed.

#### a) Victim Protection in China

It would be unfair to say that gender equality has been neglected by legislation in China. There are, in fact, a number of laws and regulations that have been enacted to protect women's legal rights. For example, the *PRC Constitution* (1982),<sup>189</sup> the *PRC Marriage Law* (1980),<sup>190</sup> the *PRC Inheritance Law* (1985)<sup>191</sup> and the *PRC General Provisions of Civil Law* (1986),<sup>192</sup> all mandate gender equality and the protection of women's legal rights. In addition, a specific women's law was promulgated in 1992, namely, the *PRC*

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<sup>189</sup> The *Constitution* guarantees women's legal rights in terms of political, economic, cultural, social and family life. ACWF ed., *The Practical Book on Women's Laws in China* (1993) The Publishing House of Law, at 469-471.

<sup>190</sup> The *Marriage Law* came into effect on January 1, 1981. It stipulates marriage freedom, monogamy, gender equality in marriage, and protection of the legal rights of women, children and senior people. The Law forbids wife purchase (in some under-developed rural areas, a man may buy a woman and force her to be his wife), arranged marriage and interfering with marriage freedom. It also forbids maltreatment and abandonment of family members. *Ibid.* at. 539.

<sup>191</sup> The *Inheritance Law* stipulates gender equality, and the protection of women's property rights, e.g. spouse as the first heir in the inheritance order, etc. *supra* note 189, at 557.

<sup>192</sup> The *General Provisions of Civil Law* stipulate gender equality as the most important basic principle and it protects the legal rights of the citizens who enjoy equal status, *supra* note 189, at 527.

*Law on the Protection of Women's Rights and Interests*,<sup>193</sup> which is supposed to protect women's rights to politics, rights to employment, rights to property and rights of the person, etc. This legislation also stipulates the criminal liabilities of those who violate women's legal rights under the Law.

The revised *PRC Criminal Law* (1997)<sup>194</sup> again attaches great importance to the control of violence against women. The maximum punishment for offenses such as murder, manslaughter, intentional assault resulting in severe physical injury, rape, illegal confinement, abduction and sale of women or/and children is the death penalty.

Illegal behavior, which is less serious than criminal behavior, is dealt with under a quasi-criminal Act: The *PRC Security Administration Punishment Act* (1989).<sup>195</sup> For instance, if a person physically assaults another person and causes minor bodily injury, or if a husband maltreats his wife and the wife wishes him to be sanctioned, it is a public security offense<sup>196</sup> that falls within the jurisdiction of art. 22(1) and (4)<sup>197</sup> of this *Act*.

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<sup>193</sup> This Law was adopted on April 3, 1992 and came into effect on October 1, 1992. It reiterates the constitutional principle of gender equality in terms of political, economic, cultural, social and family life. It also states that women enjoy special protection under the law and the law prohibits discriminating against, maltreating and cruelly injuring or murdering women. Compared to previous legislation, this law is more detailed and specific, covering some areas that have never been mentioned in legislation before, e.g. infanticide, persecution of women who give birth to female children or are infertile, and the maltreatment of elderly women, *supra* note 189, at 472.

<sup>194</sup> *The PRC Criminal Law* (1997) Beijing: The Publishing House of Law.

<sup>195</sup> *The PRC Security Administration Punishment Act* (1989) Beijing: The Publishing House of Law.

<sup>196</sup> A public security offense refers to an administrative offense, which is quasi-criminal. It is defined in administrative law and handled by the police, but unlike other non-criminal offenses handled by the police (e.g., speeding and parking violations), most public security offenses are similar to criminal offenses in

The revised *Criminal Procedure Law* (1996)<sup>198</sup> strengthens victim protection and extends the rights of victims.<sup>199</sup> For example, the Law categorizes victims of crime as participants in criminal proceedings for the first time. Thus a victim enjoys the following rights:

--the right to accuse. A victim has the right to bring forward a complaint after his/her legal right(s) is infringed.<sup>200</sup> The criminal justice system must guarantee a victim's personal security during criminal proceedings.<sup>201</sup>

--the right to bring a private complaint. When the first *PRC Criminal Procedure Law* was promulgated in 1979, a victim had the right to bring a private prosecution. The revised Law extends this right. A victim can now bring a private prosecution if the

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terms of their nature and constitutive elements. They are different only in legal classification rather than in any essential ingredient. For instance, stealing RMB\$200 is a criminal offense, whereas a theft of RMB\$150 only constitutes a public security offense. See Cheng Yang, "Public Security Offenses in China" in *British Journal of Criminology* 34 (1994) 54.

<sup>197</sup> Art. 22 stipulates: Everyone who (1) assaults another person and causes light injury in that person; ... (4) maltreats his family member(s) and the maltreated member(s) wish(es) intervention from the police; is subject to detention of less than 15 days or a fine less than RMB\$200 or admonition if the action is not serious enough to be criminal.

<sup>198</sup> *The PRC Criminal Procedure Law* (1996) Beijing: The Publishing House of Law.

<sup>199</sup> Before the revision, a victim was not a participant in criminal proceedings, s/he was only a witness and had no right to invoke an appellate proceeding if the public prosecutor decided to drop a charge or not to lodge a protest against a current ruling.

<sup>200</sup> *The PRC Criminal Procedure Law*, *supra* note 198, art. 84(2).

<sup>201</sup> *Ibid.* art. 85(3).

public security organs or people's procuratorates have refused to investigate. But the victim must show to the court that the suspect has violated the victim's personal rights and/or property rights, and that the suspect ought to bear criminal liability under the *Criminal Law*.<sup>202</sup>

--the right to representation during all phases of criminal proceedings. In order to balance the protection between a suspect/accused and a victim, the revised Law provides the victim the right to representation during criminal proceedings. This allows for better protection of the victim's legal rights.<sup>203</sup>

--the right to challenge criminal justice and judicial personnel involved in criminal proceedings. A victim has the right to challenge the police, prosecutor, judge, clerk, interpreter and expert witness who are involved in his/her criminal proceedings for the purpose of a fair trial.<sup>204</sup>

--the right to be informed of the progress of the case. A victim has the right to know the reasons if his/her case has not been filed,<sup>205</sup> when and where the court is in session,<sup>206</sup>

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<sup>202</sup> *Ibid.* art. 170(3).

<sup>203</sup> *Ibid.* art. 40 (1).

<sup>204</sup> *Ibid.* art. 28 & 31.

<sup>205</sup> *Ibid.* art. 86.

<sup>206</sup> *Ibid.* art. 151(4)

and to receive notice of any decisions by the people's procuratorate if they decide not to proceed.<sup>207</sup> During each stage of criminal proceedings, the victim is to be informed of his/her rights and relevant information by the criminal justice system.<sup>208</sup>

--the right to be heard during criminal proceedings, including appearing in court. A victim is to be informed of the expert witness evidence during the investigative stage.<sup>209</sup> The victim is to be consulted during the prosecuting stage,<sup>210</sup> and has the right to give a statement on the charge(s) during the trial stage.<sup>211</sup> With the approval of the presiding judge, a victim also has the right to question the accused<sup>212</sup> and other witnesses, including the expert witness,<sup>213</sup> to identify material evidence, and air his/her opinion with respect to written testimony, written expert testimony, the on-the-spot examination record and other evidence documents.<sup>214</sup> A victim also has the right to call a new witness to court, demonstrate new evidence and request re-check and re-appraisal.<sup>215</sup>

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<sup>207</sup> *Ibid.* art. 145.

<sup>208</sup> *Ibid.* art. 40(2) & 154, .

<sup>209</sup> *Ibid.* art. 121.

<sup>210</sup> *Ibid.* art. 139.

<sup>211</sup> *Ibid.* art. 155(1).

<sup>212</sup> *Ibid.* art. 155(2).

<sup>213</sup> *Ibid.* art. 156(1).

<sup>214</sup> *Ibid.* art. 157.

<sup>215</sup> *Ibid.* art. 159(1).



--the right to bring a supplementary civil action. A victim has the right to bring a supplementary civil action if s/he suffered property loss as a result of the criminal offense committed by the suspect.<sup>216</sup> If the victim dies or becomes incompetent, his/her legal representative or close relative has the right to bring supplementary litigation on his/her behalf.<sup>217</sup>

--the right to air different opinions on relevant decisions or rulings and the right to appeal.<sup>218</sup> If a victim believes that the police have erred in refusing to file a case, s/he has the right to be heard by the people's procuratorate<sup>219</sup> and have the latter request a police explanation of that decision. If the people's procuratorate agrees with the victim, it can request the police to file the case.<sup>220</sup> The victim also has the right to request the people's procuratorate one level higher to lodge a protest against the ruling of the first instance if a victim or her/his legal representative does not agree with the court ruling.<sup>221</sup> A victim has the right to appeal to the people's courts or people's procuratorates if s/he does not agree with any effective ruling and order.<sup>222</sup>

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<sup>216</sup> *Ibid.* art. 77(1).

<sup>217</sup> *Ibid.* art. 88 .

<sup>218</sup> *Ibid.* art. 180(1) & (2).

<sup>219</sup> The people's procuratorate in China equals the Chief Prosecutor's Office at different levels. It was modeled after the system of the former Soviet Union.

<sup>220</sup> *The PRC Criminal Procedure Law*, *supra* note 198, art. 87.

<sup>221</sup> *Ibid.* art. 182.

<sup>222</sup> *Ibid.* art. 203 & 204.

--the right to reconcile with the offender by herself/himself or through court mediation and the right to withdraw her/his petition in proceedings of a private prosecution.<sup>223</sup>

All the above mentioned laws, written in sex-neutral language, seem neutral, because the provisions are equally available to both male and female victims. However, they can only provide formal gender equality in a legislative sense. In practice, they may not guarantee gender equality in result, and therefore they may exclude abused wives from legal protection in practice. Under the influence of the public/private ideology, the protection of women as victims of domestic violence is somehow neglected, bringing about many problems in relation to the protection of women's personal rights in the family. Hence the focus of the last paragraph in this chapter.

## b) Existing Problems

### i) problems in the legislation

Canadian feminist legal scholar, Shelley Gavigan, points out that even though the rules can change, people who apply them do not automatically adjust their thinking.<sup>224</sup> Despite the

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<sup>223</sup> *Ibid.* art. 172. Art. 170 stipulates that private prosecution cases include: a) cases that are in the category that if the victim does not complain, there is no trial; b) minor criminal cases that a victim has evidence; and c) cases where a victim has evidence to prove that the accused has violated the victim's personal and property rights and thus the accused should bear criminal liabilities, but the *public* security organ or people's procuratorate decides not to investigate. Based on art. 172, cases mentioned in art. 170 (c) are not subject to mediation. These cases must go to trial.

legislative protection now accorded to victims of crimes, problems arise with implementation. Although wife beating is obviously intentional injury caused by the husband's violent acts, wife battery is not a separate offense under the *Criminal Law*. Judicial interpretation has defined it as one form of maltreatment of family members.<sup>225</sup> In this category, the state only prosecutes those cases where there are severe injuries or death. The rest are the victim's responsibility to initiate a private prosecution. For these private prosecution cases, two important conditions warrant judicial interventions: a) the victim must be able to show that the maltreatment has been ongoing for a prolonged period of time; and b) the victim must suffer at least minor injuries measured according to the *Forensic Standard on Minor Bodily Injury*.<sup>226</sup> Only when the victim meets both conditions can s/he bring a private complaint to the court. As the courts have shown an unwillingness to accept such cases, it is not easy for a victim to secure a conviction. This is so for a number of reasons. First, most injuries do not meet the high standard for minor injuries, such as a broken nose, loss of half a finger<sup>227</sup> etc. Bruises, bleeding and swelling alone do not constitute minor injury. Second, few women know how to obtain forensic evidence. Where forensic clinics are and how to apply is by no means common

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<sup>224</sup> Shelley Gavigan, "Law, Gender and Ideology" in Anne F. Bayefsky, ed., *Legal Theory Meets Legal Practice* (1988), Edmonton, Academic Printers and Publishing, at 283-295.

<sup>225</sup> Chen Xingliang, *Annotation on the Criminal Law* (1997) Beijing: The Publishing House of China University of People Public Security, at 431-432.

<sup>226</sup> This Standard was jointly issued by the PRC Ministry of Justice, Supreme People's Court, Supreme People's Procuratorate and Ministry of Public Security on April 2, 1990. It is used as a measurement for minor bodily injuries in criminal proceedings. See Shi Qingben & Meng Zhaoyang eds., *supra* note 160, at 2105-2108.

<sup>227</sup> *Ibid.* at 2107.

knowledge.<sup>228</sup> Third, a private action means that the abused wife has full responsibility for bringing the charge against her husband. This is difficult for most woman, for fear of retaliation.<sup>229</sup> Even when a woman does bring a private action, frequent withdrawal pending trial is a common phenomenon. This may be due to a number of factors: a) threats from the abusive husband; b) consideration for her child;<sup>230</sup> c) concern for her future life if she has become disabled;<sup>231</sup> and/or d) the discouragement from the judicial system.

Like the *Criminal Law*, the *Security Administration Punishment Act* does not define wife beating. It requires the police to intervene if a maltreated person wishes another family member, the perpetrator, to be sanctioned. It does not mention specifically whether it is mandatory for the police to respond to wife assault in the locality. In practice, the vagueness of the law gives the patriarchal and unwilling police excuses to stay away from wife abuse cases.

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<sup>228</sup> My major is criminal procedure law in China, but I have no idea where to find the authorized forensic clinics and how to apply for an examination. I would assume that 95% of women as well as men in China are as uninformed as I am in this respect.

<sup>229</sup> *China Women's News*, "We Should not Forget Those Wives Who Don't Have Household Residence Registration in the City", January 26, 1996, N1.

<sup>230</sup> While it is a general judicial practice that the custody of a child is usually given to his/her mother if a marriage breaks up, a Chinese woman will also consider a) whether it is good for the well-being of her only child, who is commonly regarded as a "little emperor" in the family under the "One Child Policy", because it is a common belief in Chinese society that a step parent is never as good to a step child as the child's natural parent; and b) whether her child will regard her as someone who breaks up a good family and destroys the child's happiness. It is not uncommon for a "little emperor" to threaten his/her mother that if she wants a divorce, s/he would hate her for the rest of his/her life. See *China Procuratorial News*, "A Report on the Psychology of Abused Wives", May 20, 1998, N3.

<sup>231</sup> *Harbin Daily*, "Why Did the Battered Wife Drop Her Charge?", January 28, 1996, N1.

ii) problems in law enforcement

As is mentioned above, the law in China is ostensibly neutral as it applies to both male and female victims, but its application is gender-biased. The criminal justice system in China is under the strong influence of public/private ideology that denies state responsibility for the protection of battered women and perceives battering as a private problem, neither serious nor criminal. Most criminal justice personnel view wife abuse as a family dispute that requires no outside intervention and does not endanger social stability. It therefore often justifies the immunity of the husband from criminal liability when it comes to wife beating. From 1992 to 1994, there were about 300 women in Shanghai who were severely assaulted by their husbands, some with kidney bleeding and/or broken ribs, but most of the abusers were not charged with an offense.<sup>232</sup> In present-day China, the "110" police hot-line does not respond to domestic violence calls, nor do the police intervene in wife beating.<sup>233</sup> Some claim that their responsibility is to keep public order, not family order.<sup>234</sup> Others say they are short staffed and do not have time to handle domestic affairs as they

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<sup>232</sup> *China Women's News*, *supra* note 136.

<sup>233</sup> *China Women's News*, "Family Refuses Violence", September 9, 1996, N3.

<sup>234</sup> Li Dun, "Marital Rape in China: Analysis of the Relationship between the Individual Rights and the Collective Interests from the Perspective of Law and Sociology", unpublished paper, *supra* note 8; Deng Juying, "Analysis of the Causes of Current Situation and Countermeasures against Domestic Violence", unpublished paper, *supra* note 4; Wu Changzheng, "The Role of Law in Controlling Domestic Violence", unpublished paper, *supra* note 4.

need to investigate important cases that have greater social significance.<sup>235</sup> Still others blame the battered wives, telling them that "one palm does not make a sound".<sup>236</sup> They say that women should not ask the police to punish their husbands who are their closest family members. When approached by battered women, the police advise them to go to women's federations to pour out their grievances.<sup>237</sup> Numerous articles in the *China Women's News* and unpublished reports on domestic violence cases show that many battered women go to relevant agencies for help without success until tragedy finally occurs.<sup>238</sup>

Even in cases when the police do respond to calls, they often do not see the criminal nature of wife abuse. Some of them try to reconcile the couple, or criticize both the husband and the wife, or simply refuse to get involved.<sup>239</sup> Others criticize the batterer, tell both parties to be more tolerant to each other and try to mediate between the couple.<sup>240</sup> The rationale behind this is that a couple is one family, and that family members tend to forget their conflict and forgive each other easily and quickly. The police feel that if they do intervene, the couple will not appreciate it when they are reconciled. "That's why when

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<sup>235</sup> *China Women's News*, "The Society Must Not Be Indifferent to Domestic Violence", February 6, 1996, N1.

<sup>236</sup> *Ibid.*

<sup>237</sup> Deng Juying, *supra* note 234.

<sup>238</sup> *China Women's News*, "The Media Has the Responsibility to Eliminate Domestic Violence", October 22, 1998, N3.

<sup>239</sup> Xue Ninglan, *supra* note 151.

<sup>240</sup> *Legal Daily*, *supra* note 153.

we are approached by battered women, we generally warn the batterer of the possible legal consequence of his behavior, that's all we can do".<sup>241</sup> Under this principle, police officers only intervene if death or severe injuries are involved. As such, although these offenders are finally punished, the rights to life and health<sup>242</sup> abused women are entitled to under the law are not guaranteed.

There are generally few avenues open for battered wives to seek support and protection from the law. This is so even after they are legally divorced. The abuse of a woman by her ex-husband is still regarded as a family affair and is not dealt with under the *Criminal Law* or *Security Administration Punishment Act*.<sup>243</sup> For example, in 1992, a Guangzhou newspaper published a letter which described how a secondary school teacher had suffered 4 years of repeated harassment from her ex-husband. Although she had repeatedly appealed for assistance to many "relevant departments" and had reported the abuse, she never received the necessary help.<sup>244</sup> Statistics from Heilongjiang Provincial Women's Federation shows that the offender of 41% reported cases of abuse is a woman's ex-

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<sup>241</sup> *Ibid.*

<sup>242</sup> Art. 98 of *The PRC General Provisions of the Civil Law*, (1986) stipulates that every one is entitled to life and health. The right to life and health is one of the fundamental rights of the person enjoyed by a citizen. Deprivation of either of them, other than capital punishment by law, is prohibited. See Liu Yaping ed. *A New Collection of the Annotations to the PRC Laws that Are Most in Use* (1992) Beijing: China Procuratorial Press, at 382.

<sup>243</sup> Jiang Wenjing, *supra* note 4, at 2.

<sup>244</sup> *Yang Cheng Evening News*, June 17, 1992.

husband.<sup>245</sup> Statistics from Harbin Municipal Women's Federation show that the federation received 28 reports of cases of violence against women by their ex-husbands in 1994. Of these, 5 were murder and injury, and 18% were severe violence.<sup>246</sup> It seems once a woman marries someone, she becomes his private property forever, and even divorce cannot change the situation.

The people's procuratorate seems to share the public/private ideology with the police. It is often more sympathetic to the abuser than to the abused woman. Often it is reluctant to prosecute wife beaters, even when the wife is physically disabled. For instance, one battered woman was blinded by her husband. Her injury constituted a severe degree of injuries according to Forensic Standard on Severe Bodily Injury, but the local procuratorate exercised its discretionary power and exempted the husband from punishment for the purpose of "alleviating familial disputes and improving spousal relationship".<sup>247</sup> With such a "principle" in mind, it is no wonder that few abusive husbands are punished or sanctioned even when their abuse is cruel and serious.<sup>248</sup> In these people's eyes, a marriage certificate is a "contract" that allows a husband to beat his wife.

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<sup>245</sup> *China Women's News*, "Getting Rid of the Shadow Cast by 'Violent Husband'", July 5, 1995, N3.

<sup>246</sup> *China Women's News*, "Sisters, You Should Go Ahead Bravely with the Law in Your Hand", April 12, 1995, N3.

<sup>247</sup> *China Women's News*, *supra* note 157; Wu Miaohua, *supra* note 125, at 116.

<sup>248</sup> *Ibid.*



With the police reluctant to intervene and the procuratorate unwilling to prosecute, most of the few cases that finally make their way to court are private prosecutions. Because it is usually difficult for an abused woman to prove to the court that her abuser has committed an offense punishable by the law,<sup>249</sup> the courts do not actively accept these cases.<sup>250</sup> The courts have refused to interfere, in most cases, claiming that they are "trivial family disputes" that need no outside interference.<sup>251</sup> Given the huge backlog, the courts do not want to "waste" their time when a conviction is not assured. Therefore, although victims technically have the right to bring private prosecution to court under the *Criminal Law*, in practice, these rights are often not exercised.<sup>252</sup>

The criminal justice system in China, as in other countries, has been established to protect the legal rights of all its citizens regardless of their gender. However, under the influence of the ideologies of patriarchy and privacy, it has not effectively protected victims of wife beating. A woman is regarded as the property of her husband and wife abuse is seen as a

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<sup>249</sup> It is difficult for several reasons: a) it is her word against his and sometimes she even goes back on her own words due to a sense of shame or for fear of retaliation; b) if there is a witness, s/he often refuses to appear as a witness, believing it is a family matter; c) she simply does not have medical records to support her case; and d) it is difficult to find a lawyer to represent her, partly because there are very few lawyers in China compared to its huge population, and partly because lawyers prefer not to take such cases as this kind of representation consumes a great deal of time, but earns very little compared to cases in the financial area.

<sup>250</sup> Chen Xiao, "The Causes, Dimensions and Control of Wife Abuse", unpublished paper, *supra* note 4, at 7.

<sup>251</sup> *China Women's News*, "Why Is It So Difficult to Enforce the Law?-- Discussions On How to Protect Women's Legal Rights During the Eighth National Women's Conference", September 8, 1998, N2.

<sup>252</sup> *Ibid.*

domestic affair. The criminal justice system often excludes a man from prosecution when the object of his assault is his wife and excludes a woman from protection when her assailant is her husband. It is no surprise when many abused women say they do not understand why police intervene in minor quarrels and fights between neighbors, but refuse to respond to severe wife beating.<sup>253</sup> Reluctance and ineffectiveness of the criminal justice system may make some batterers even more unbridled in abusing their wives. The question remains: what are the underlying causes that make the criminal justice system fail to enforce the *Criminal Law* faithfully when it deals with violence against women in the family? The following Chapter tries to find an answer.

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<sup>253</sup> *Legal Daily*, "Where to Seek Protection from Domestic Violence?", March 12, 1997, N7; Deng Juying *supra* note 234.

## Chapter Four: Analysis of the Failure of the Criminal Justice System

As discussed in the last Chapter, both the *Criminal Law* and the *Security Administration Punishment Act* have sections regulating punishment for intentional physical assault, but they do not define wife assault as a specific offense. Therefore, most abusive husbands are not punished under the *Criminal Law*. Many factors play a role in this phenomenon, including the inadequate attention from the state, the lack of independent women's organizations, the influence of patriarchal ideology, the misleading messages from the media and social indifference, etc. In this Chapter, efforts are made to identify these factors and explain them in the Chinese context.

### (a) State Criminal Policy

The public/private dichotomy plays an important role with respect to political attitudes in terms of protecting women from violence by their husbands. Although, since 1949, progress has been made in terms of drafting laws protecting women, establishing organizations to work on women's issues and raising public awareness on gender equality,<sup>254</sup> these initiatives are largely limited to the protection of women's rights in the

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<sup>254</sup> Human Rights in China, *supra* note 176, at 291.

public sphere,<sup>255</sup> with violence against women in the family excluded. Little has been done to protect wives from abuse or to provide protection for abused women.<sup>256</sup> The reasons include the following:

First, there is no state acknowledgment that domestic violence is a serious social problem. As such, there is not much political will to tackle this issue. For example, in China's State Report on the Implementation of the *Nairobi Forward-Looking Strategies*,<sup>257</sup> domestic violence was not raised specifically.<sup>258</sup> When questioned about the level of violence against women in China by the experts on the *Convention on the Elimination of all Forms of Discrimination against Women*, China's representative said that "violence against women had not been a serious social problem in China".<sup>259</sup> China's 1994 white paper on women<sup>260</sup> only mentions that "wife purchase, female infanticide, abducting and selling

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<sup>255</sup> For example, women's equal opportunity to employment. Thanks to these efforts, women in China now participate in practically all spheres of business, industry and government. To protect women's rights to life and health, the punishment for violations are severe. For example, both the offense of rape and the offense of abduction and sale of women are regarded as posing a serious danger to the public order. Therefore, the maximum punishment for these two crimes with especially serious circumstances is the death penalty. *The PRC Criminal Law*, *supra* note 194, art. 236 & 240.

<sup>256</sup> Human Rights in China, *supra* note 176, at 6.

<sup>257</sup> *Report of the World Conference to Review and Appraise the Achievement of the United Nations' Decade for Women: Equality, Development and Peace, (Nairobi: July 15-26, 1985), including the Agenda and the Nairobi Forward Looking Strategies for the Advancement of Women, A/CONF. 116/28/Rev. 1.1986.*

<sup>258</sup> *Ibid.*

<sup>259</sup> *Ibid.*

<sup>260</sup> This is an important government document proclaiming its political policy. It is called "white paper" because the cover of the book is white. The practice of issuing a white paper is adopted by the governments and parliaments of some countries in the world when they need to publicize their important policies on politics, foreign affairs and finance.

women<sup>261</sup> still exist in China, especially in remote rural areas".<sup>262</sup> As for wife beating, there is only half a sentence which states that "the phenomenon of maltreatment of wife and daughter-in-law is no longer tolerated in the society".<sup>263</sup> In China's 1995 white paper on human rights, the only mention of domestic violence is "The phenomenon of maltreatment of wife and daughter-in-law is no longer tolerated in the society, domestic violence, a serious social problem in some western countries, is comparatively rare in China".<sup>264</sup> When the State Council issued its 1996 white paper on human rights in China, it did not mention the issue of domestic violence at all.<sup>265</sup> Given the fact that evidence of wife abuse exists in China, as shown in Chapter Two of this thesis, the attitude in these white papers shows that the government has a strong sense of the public/private division in its criminal policy-making and has not paid sufficient attention to the protection of women's legal rights in the home.

Second, under the influence of the ideology of the public/private divide, criminal policy makers do not think domestic violence, such as wife battery, constitutes a social danger. They attach much more importance to the control of crimes against women by non-family

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<sup>261</sup> They are all offenses against women seen as raising public concerns.

<sup>262</sup> The PRC State Council, *Women's Situation in China* (June 1994), at 33.

<sup>263</sup> *Ibid.* at 30.

<sup>264</sup> The PRC State Council, *Progress in China's Human Rights Cause* (December 1996), at 30.

<sup>265</sup> The PRC State Council, *Progress in China's Human Rights Cause* (March 1997).

members that are regarded as endangering public security.<sup>266</sup> Two recent official movements aiming to crack down on crimes against women's personal rights have not included crimes committed by a woman's husband. Both of them were initiated in 1991 by the decisions adopted by the Standing Committee of the National People's Congress. One was to prohibit prostitution and patronizing prostitutes.<sup>267</sup> The other was to punish offenders who abduct and sell women and children.<sup>268</sup> These initiatives deal with violence against women in the community instead of in the family. This is just one example of how the state takes women's rights in the public sphere seriously while overlooking women's personal rights in the private sphere.

Third, the public/private dichotomy with respect to wife abuse is further shown in the state's efforts to discourage divorce even when domestic violence is involved. The requirement of mediation in divorce cases has been used as a method of preventing divorce.<sup>269</sup> Before a divorce decree can be granted, mediation is required regardless of

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<sup>266</sup> Crimes that violate a woman's right of the person committed by someone other than her husband are deemed to pose a danger to the public order, because these crimes stir public anger towards the state or fear for personal safety. These crimes include murder, serious injury, rape, using violence, coercion or other means to insult women in public, abduction and sale of women, purchase of women who are abducted, etc. See also Ann D. Jordan, *supra* note 120, at 90.

<sup>267</sup> The PRC Standing Committee of the National People's Congress: *Decision Relating to the Strict Prohibition of Prostitution and Patronizing Prostitutes*, in Ma Yuan, ed., *supra* note 6, at 373-379.

<sup>268</sup> The PRC Standing Committee of the National People's Congress: *Decision Relating to the Severe Punishment of Criminal Elements Who Abduct and Kidnap Women and Children*, in Ma Yuan, ed., *supra* note 6, at 369-372.

<sup>269</sup> Martha J. Bailey, "Mediation of Divorce in China" in *Canadian Journal of Law and Society* 8 (1993) 45, at 56; The PRC Ministry of Justice, *supra* note 81, at 62, 82 & 119.

whether the divorce is contested or by mutual agreement.<sup>270</sup> There are two kinds of mediation: people's mediation which is deemed as the first preventive measure for maintaining social stability<sup>271</sup> and judicial mediation as the last resort to maintain a couple within a marriage. People's mediations of marriage disputes are conducted by the people's mediation committee in their local neighborhood committee. Particularly in rural areas, family disputes including violence against women in the home constitute the majority of cases that enter the track of grassroots mediation.<sup>272</sup> In a traditional country like China, the duty to remain married for the good of the society is taken seriously, even if the marriage was not a love match.<sup>273</sup> At present, most mediators in China are pensioners who are willing to conduct mediation for free based on their experience, their enthusiasm and their prestige in the community.<sup>274</sup> Many are not well educated and have little legal

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<sup>270</sup> Art. 25 of the *PRC Marriage Law* (1982) stipulates: (1) When one party insists on divorce, the organizations concerned may try to effect a reconciliation, or the party may appeal directly to the people's court for divorce. (2) In dealing with a divorce case, the people's court should try to bring about a reconciliation between the parties. In cases of complete alienation of mutual affection and when mediation has failed, divorce should be granted.

<sup>271</sup> Under the mediation law, people's mediation is a kind of mass activity requested by the disputed parties and conducted by the people's mediators. There are currently over one million mediation committees with over 10 million mediators in China. On the basis of laws, regulations and state policies, mediators encourage both parties to sit down and settle their disputes through friendly consultation, mutual understanding and accommodation with the help of mediators. However, agreements reached through people's mediation are not legally binding, which is different from those in most western countries. According to statistics from the Grassroots Section in the Ministry of Justice, approximately 6 million civil disputes are successfully mediated through people's mediation every year. This is deemed to have reduced possible crimes and thus contributed to the national unity and social order. The Ministry of Justice, *supra* note 81, at 114.

<sup>272</sup> *Ibid.* at 119.

<sup>273</sup> Martha J. Bailey, *supra* note 269, at 59.

<sup>274</sup> *Ibid.* at 68-70; Also, my interview with Ms. Yao Jinglan, model mediator in the Mediation Committee in Andelu Neighborhood Committee in Beijing on the morning of September 23, 1998.

knowledge.<sup>275</sup> They sincerely believe that being beaten by one's husband is not a valid ground for divorce,<sup>276</sup> which is believed to be bad for the couple, the child and the society. Accordingly, they try their best, including getting involved without being invited from the disputed parties to maintain marriages,<sup>277</sup> which could be disastrous for abused women. This is so, because a) mediation efforts are mostly directed to the prevention of divorce if possible;<sup>278</sup> b) as it is mentioned in note 270, agreements reached through people's mediation is not legally binding, violations of mediation agreements are frequent,<sup>279</sup> especially those reached between an abusive husband and his abused wife.

Also, as the last resort to maintain a couple within a marriage, judicial mediation is an inevitable step before a divorce petition enters a formal process.<sup>280</sup> Successful mediation might be obtained at the expense of the battered woman's interest if the judge is not aware

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<sup>275</sup> Liu Jinghui & Jing Jueming, "On the Legal Improvement and Perfection of the People's Mediation in China", in *Judicature Today* 4 (1998) 5, at 6; Martha J. Bailey, *supra* note 269, at 70; Human Rights in China, *supra* note 176, at 29.

<sup>276</sup> Martha J. Bailey, *ibid.*

<sup>277</sup> Liu Jinghui & Jing Jueming, *supra* note 274, at 5-6; Martha J. Bailey, *supra* note 269, at 60-61, 68. There are a few cases where mediators persuade the unwilling party to agree to a divorce when they are convinced that it is impossible for the disputed couple to remain as man and wife. My interview with Ms. Wang Wenlan, one of the 1997 model mediators in Beijing on the afternoon of September 23, 1998; The Ministry of Justice, *supra* note 81, at 114.

<sup>278</sup> Human Rights in China, *supra* note 176, at 28; Zhang Qinghua, *supra* note 124, at 6.

<sup>279</sup> Liu Jinghui & Jing Jueming, *supra* note 275, at 4.

<sup>280</sup> Yang Dawen, *Study on Marriage Law* (1986) Beijing: The Publishing House of Law (1986) at 172; Zhang Yong, "Divorce Petition and Cross Divorce Petition" in *Journal of Jurisprudence Forum* 1 (1989) 78, at 79.



of the dynamics of domestic violence. For example, Zhou was badly battered when she arrived at Wu Han New Sun Women's Shelter in October 1995. She was married for over ten years and battered for the same length of time. Zhou filed a divorce petition but her husband refused to be divorced. The court mediator refused to grant divorce since there was still hope of reconciliation, as the husband repeatedly claimed his love for his abused wife. After that, the violence increased. Zhou fled from home, but her husband followed her and assaulted her wherever he found her. In despair, Zhou went to New Sun Women's Shelter for help.<sup>281</sup> To battered women, this policy of non-interference in the family relations obviously represents snow plus frost—one disaster after another.

The recent revision of the PRC *Marriage Law* with respect to grounds of divorce also illustrates this political intention to control the divorce rate. Since China's opening to the outside world, more and more people have realized that a marriage without love should be dissolved. Changes have taken place in the attitudes of judicial mediators with respect to divorce. In a recent telephone conversation with a judge in the Supreme People's Court,<sup>282</sup> I was told that in recent years, although mediation is still mandatory, it is not for the sole purpose of reconciliation. A court may persuade a couple to divorce if it is convinced that one of the parties no longer loves the other. If frequent violence is involved, some courts

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<sup>281</sup> *China Women's News*, "Marriage Post Station: The Live Witness of Domestic Violence: 90% of the Women Who Came to the Shelter Are Cruelly Battered in the Home", January 10, 1996, N1.

<sup>282</sup> My telephone conversation with Madame Wu Xiaofang, a judge in the Civil Action Section in the PRC Supreme People's Court, on September 11, 1998.

may grant divorce at the first hearing of the case. The same is true with some people's mediators who help contesting parties to reach an agreement of divorce if they are convinced that there is no hope of conciliation.<sup>283</sup>

However, because of this tendency, the divorce rate in China has been soaring in recent years. Statistics show the national divorce rate in China has been 0.35 per thousand marriages in 1980, 0.72 in 1992,<sup>284</sup> 0.77 in 1993,<sup>285</sup> 1.54 in 1994,<sup>286</sup> and 1.75 in 1995.<sup>287</sup> The current national divorce rate, however, has increased to about 10 per thousand marriages.<sup>288</sup> The rapid increase in divorce rate has caused serious concern in China, where it is strongly believed that families are social units whose stability have a direct bearing on the stability of society as a whole,<sup>289</sup> and where dissolution of a family has never been officially encouraged.

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<sup>283</sup> The PRC Ministry of Justice, *supra* note 81, at 111.

<sup>284</sup> *China Women's News*, "Women's Marriage in China", April 13, 1995, N3.

<sup>285</sup> *China Women's News*, "The Current Changing Situation and Its Tendency", June 20, 1995, N3.

<sup>286</sup> *Women's Situation in China*, *supra* note 262, at 31. However, Divorce rate in big cities could be much higher. For instance, *China Daily* reported 19% in Beijing in 1993, See *China Daily*, April 22, 1994.

<sup>287</sup> *China Women's News*, "Divorce over the Country in 1995 Has Surpassed One Million Couples", April 14, 1996, N1.

<sup>288</sup> *China Women's News*, "Women's Rights Should Be Protected by Law—Discussion on the Revision of Marriage Law During the Eighth National Women's Congress", September 6, 1998, N2.

<sup>289</sup> The PRC State Council, *supra* note 262; Human Rights in China, *supra* note 176; Zhang Qinghua, *supra* note 124, at 6; Jiang Wenjing, *supra* note 4, at 1; Huang Cuizheng, *supra* note 125, at 10; *China Procuratorial News*, "Crimes Committed by Family Members", May 23, 1995; Guo Deming, "Analysis of 100 Offenses Committed by Family Members" in *Journal of the University of Public Security* 2 (1992) 37, at 37-40.

In order to address this situation and preserve so-called social stability through family stability,<sup>290</sup> the draft of the new *Marriage Law* stipulates that a 3-year-separation<sup>291</sup> is required before a divorce decree might be granted. Although this suggestion has been met with strong opposition and is called "retrogression" by many people, including judges, scholars, especially those younger and more open-minded scholars and deputies of the Eighth National Women's Congress,<sup>292</sup> it is not known whether the section will be changed or omitted when the draft is submitted to the National People's Congress for adoption in March 1999.

Lack of political will has greatly hindered the development of a real campaign against domestic violence in China. The ideology of the public/private dichotomy allows government to clean its hands of any state responsibility to protect women from violence in their homes.<sup>293</sup> There is no indication at present that this issue will be taken into consideration in developing future policy.

#### (b) Lack of Independent Women's Organizations

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<sup>290</sup> *China Women's News*, "Watch Out for Violence in the Sun", October 20, 1995, N1.

<sup>291</sup> The current separation requirement for a divorce is six months.

<sup>292</sup> News Digest, "Debate Triggered by the Draft of Marriage Law", August 13, 1998, N3; *Beijing Evening News*, "Law and Moral, Which Should Be Used to Restrict Divorce?", September 22, 1988, N2.

<sup>293</sup> Nicola Lacey, "Theory into Practice? Pornography and the Public/Private Dichotomy" in *Journal of Law and Society* 20 (1993) 93.

Women's federations in China have been established to represent the interests of women. Since their establishment in March 1949, women's federations have played an important role in raising women's social status and helping women in need of assistance. They are especially successful in their literacy programs. Some of their successful programs include "Women Helping Women Get Rid of Illiteracy Action" which was implemented by the women's federations at different levels in the country. As a result, there are 15,000,000 Chinese women who have become literate between 1990 and 1995. The national women's illiteracy rate has been reduced to 23% at present from 95% in 1949.<sup>294</sup> Women's federations are also very successful in helping women in poverty to become independent financially. For example, with the "Women Support Poor Women Action" program implemented by ACWF, 280,000 women successfully increased their income above the poverty line in one year.<sup>295</sup> In fact, in 1996, ACWF received US\$ 620,000 in international sponsorship and established 14 development projects for women, including a number of support-the-poor bases in Shaanxi, Gansu, Guangxi and Shanxi provinces.<sup>296</sup>

Also, within their capacity, women's federations are ready to assist victims of domestic violence. For example, Zhang Shuxian was frequently assaulted by her husband due to her

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<sup>294</sup> *China Women's News*, "The Strategic Task of Raising Women's Overall Quality", November 30, 1995, N1.

<sup>295</sup> *China Women's News*, "2.8 Million Women Said Good-bye to Poverty", November 27, 1996, N1.

<sup>296</sup> *Ibid.*

failure to give birth to a son. She killed her husband in 1997 and was sentenced to life imprisonment. Worrying about her old parents and her two young daughters, she wrote to the local women's federation for help. The federation has provided support to her children, having their tuition fees exempted, having clothes and money donated to the family and visiting Zhang in prison.<sup>297</sup> With the growing recognition of the problem of domestic violence, some women's federations have successfully sought cooperation with the local police in helping victims of domestic violence.<sup>298</sup> In 1996, the first Anti-Domestic Violence Association came into being in Tangshang city.<sup>299</sup> These are just some of the reasons why women's federations in China are commonly regarded as "women's maternal home".

However, as it is explained in note 14, women's federations are not independent from the government, and one of their important policies is to carry out the Party's basic policy. Thus when the rights and interests of battered women are in conflict with the objectives of the Party, the latter will take precedence.<sup>300</sup> While women's federations should speak out for women whose legal rights are violated,<sup>301</sup> there are instances when they have refused

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<sup>297</sup> *China Women's News*, "When A Letter Asking for Help Was Sent to the Women's Federation..." October 12, 1998, N2.

<sup>298</sup> *China Women's News*, "Family Matters Can Be Dealt With Under the Law", February 2, 1996, N1.

<sup>299</sup> *China Women's News*, "The First Anti-Domestic Violence Came Into Being in Tangshang", February 9, 1996, N1.

<sup>300</sup> *Human Rights in China*, *supra* note 176, at 2.

<sup>301</sup> *China Women's News*, "Be Courageous to Speak on behalf of Women: A New Train of Thought on Gender Equality When the Ninth Five-Year-Plan Is Established in Jianxi", November 6, 1996, N1.

to cooperate. In one instance when the media wished to expose incidents of violations of women's rights, a grassroots federation refused, for fear that media exposure would embarrass the local government and that cooperating with the media would damage their relationship with the local government.<sup>302</sup> For the same reason, since the issue of spousal abuse has not drawn serious attention from the Party, the women's federations have had to keep a low profile on this issue.<sup>303</sup> For example, neither the New Zealand-funded Sino-New Zealand Women's Project nor the CIDA-funded Sino-Canada Women and the Law Project<sup>304</sup> is able to allocate any funds to assist battered women in China. As the implementing party for both projects in China, the ACWF somehow persuaded both its foreign partners to use the funds to help poor women in China. They have emphasized the issue of poverty as the most important issue to women in China. As a result, these foreign funds were directed to helping poor women in remote areas and women who have been laid off to retrain.<sup>305</sup> While this is a way to help achieve gender equality, it leaves battered women in desperate need of shelters with no shelters to go to.

### (c) Patriarchal Ideology

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<sup>302</sup> *China Women's News*, *supra* note 251.

<sup>303</sup> My interview with a staff member of ACWF who wished to remain anonymous, on June 6, 1998.

<sup>304</sup> The information comes from my respective talks with Ms. Helen Huang (she used to work for a woman's crisis line in Beijing), a new immigrant psychologist working for Chimo Crisis Line in Richmond, on July 3, 1998 and with Dr. Vincent Yang in the International Center at UBC, on July 2, 1998. More direct information is not available.

<sup>305</sup> *Ibid.*

Most of the criminal justice personnel in China are under the influence of the ideology of male supremacy. China is a country with 5000 years of history. Throughout its ancient societies, patriarchal ideology permeated every corner of the society. Many ways were developed to keep women subordinated to men. For example, the *Li* system<sup>306</sup> required the complete submission of a woman to her father or husband throughout her whole life with no independent personhood, no marital freedom and no right to property.<sup>307</sup>

When China became a feudal society, the regulations contained in the *Li* system were reconfirmed and further developed. *Nujiao*<sup>308</sup> books were written and provided to women in almost all the feudal dynasties which advocated women's complete obedience to men.<sup>309</sup> The core of these norms was to maintain patriarchal rule both in society and in the family.<sup>310</sup> These patriarchal moral and behavioral norms for women were approved and maintained by law.<sup>311</sup> For example, under the principle of "family members are not to

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<sup>306</sup> In Chinese slavery and feudal societies, *Li* referred to the ethical and moral norms and was also a very important part of the legal system. The function of *Li* was to prevent violations while law was to punish violations. See Xue Ninglan, *supra* note 128, at 32; Cui Min, *Punishment and Law in Ancient China* (1992) Beijing: Xinghua Press, at 27-32.

<sup>307</sup> Xue Ninglan, *supra* note 151, at 31-40.

<sup>308</sup> *Nujiao* refers to a kind of education of women in feudal society. It educated women how to speak and behave in a proper feudalistic way. See Xue Ninglan, *ibid.* at 41-42.

<sup>309</sup> If her husband divorced her, she should not remarry and if her husband died, she should either die with him or remain single. See Xue Ninglan, *ibid.* at 47-50.

<sup>310</sup> Zheng Zhaofang, *supra* note 126, at 98.

<sup>311</sup> Cui Min, *supra* note 306, at 53.

accuse each other" (qing qing xiang rong ying), if a wife or concubine went to court and accused her husband or his parents or grandparents of any offenses, she was to be sentenced to a hundred canings plus 3 years in jail.<sup>312</sup> Also, wife assault was treated under different judicial policies. If a wife beat her husband who sustained no injury, the wife was automatically sentenced to one year in prison. In the case of serious bodily injury to the husband, the wife was punished three degrees more severely than if the husband had been beaten by a stranger. However, if the husband beat his wife with no resulting injuries, he bore no criminal liability. If the wife suffered severe injury, the husband was punished under an offense two degrees less severely than if the wife was beaten by a stranger.<sup>313</sup> What is more, when a husband killed his wife, he could still be exempted from capital punishment under a special rule, if his parents had died and he had no siblings.<sup>314</sup> His sentence would then be two months in prison and 40 canings.<sup>315</sup>

During the rule of the National Party (1927-1949), women were granted equal civil, political and property rights in law, but these rights were not enforced in practice.<sup>316</sup> For

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<sup>312</sup> Cheng Guangzhong & Sheng Guofeng, *The Ancient Legal System in China* (1984) Beijing: The Mass Press, at 56; Bian Jianlin, *The Theory and Practice of the Criminal Procedural System* (1993) Beijing: China Procuratorial Press, at 18-19; Cui Min, *ibid.*, at 46-47.

<sup>313</sup> Cui Min, *ibid.* at 53; Yang Dawen, *supra* note 280, at 141.

<sup>314</sup> Tao Xisheng, *The Criminal Trial System and Criminal Procedure in Qing Dynasty* (1972) Taipei: Shi Huo Press Corporation Limited, at 68; Jiang Xing, "On the Progressiveness of Specific Legislation on Domestic Violence", unpublished paper, *supra* note 4.

<sup>315</sup> *Ibid.*

<sup>316</sup> Martha J. Bailey, *supra* note 269, at 49-50.



example, the *Civil Law* of 1931 regulated that a married woman must adopt her husband's last name, choose her husband's domicile to live, not ask for a divorce on the basis that her husband had concubine(s), and not remarry until six months after divorce.<sup>317</sup>

Even after 1949 when the feudal system was officially proclaimed to be abolished by legislation and government policy, and gender equality was introduced in all laws, patriarchal notions still persisted in society. For example, although the *Marriage Law* of 1951 expressly stipulated that men and women had marital freedom, the resistance from the society was so great that wife purchase<sup>318</sup> and arranged marriages remained the practice in many places.<sup>319</sup> Women who wanted a divorce were regarded as traitors and heretics.<sup>320</sup> To get a divorce, a woman actually needed to get the approval of her husband, her mother-in-law and the responsible official in the locality.<sup>321</sup> Some local legislatures went so far as to contradict the basic principles of the *Marriage Law*, regulating that a divorced woman was not allowed to remarry before her ex-husband did.<sup>322</sup> In fact, the

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<sup>317</sup> Xue Ninglan, *supra* note 151, at 59-60.

<sup>318</sup> In some remote areas in China, people are still very poor. Young women prefer to marry men in richer areas, leaving men in poor areas unable to find a wife. In order to find a woman to be his wife, a man in a poor area may purchase a woman from a woman trafficker (who brings women to poor areas under the pretext of finding easy and well-paid jobs for them), rape the woman he has paid for and force her to be his wife, usually with violence and confinement.

<sup>319</sup> Yang Dawen, *supra* note 280, at 70.

<sup>320</sup> Xue Ninglan, *supra* note 151, at 79.

<sup>321</sup> *Ibid.*

<sup>322</sup> *Ibid.*

resistance to women's marital freedom was so strong that, according to incomplete statistics, the national annual number of women who committed suicide or were killed as a result of the failure to obtain divorces amounted to 70,000-80,000 during the first 2-3 years after the enactment of the *Marriage Law* of 1951.<sup>323</sup> To curb this phenomenon, the central government launched a national mass movement in 1953 in an effort to remove patriarchal ideology from people's minds. This movement called for education of both men and women on gender equality. The government also examined how effectively the *Marriage Law* was being enforced over the country. This mass movement was very effective in enabling unhappy married women to obtain divorces. The percentage of wife purchase and arranged marriages were also reduced. Although the number of women who successfully obtained divorce is not available, the statistics from 28 provinces and municipalities both in 1955 and 1957 show that among the marriage applications at that time, over 90% was in conformity with the principle of marital freedom, namely, the couple entered their marriage on a voluntary basis.<sup>324</sup>

Today, China is still a very traditional country. Although gender equality has been formally advocated since 1949, gender equality in law does not mean gender equality in reality. Patriarchy is a persistent part of the social ideology in China that is not easily eliminated. Prejudice against women in the society still exists, even after China adopted a market

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<sup>323</sup> *Ibid.* 128, at 79-80; Yang Dawen, *supra* note 280, at 73; Martha J. Bailey, *supra* note 269, at 57.

<sup>324</sup> Xue Ninglan, *ibid.*, Yang Dawen, *ibid.*

economy in 1980's. In terms of university admission, female students often need higher scores than male students in order to be admitted. Upon graduation, it is more difficult for female students to find satisfactory jobs. With respect to free housing allocation, male employees have priority over female employees. With regard to employment, women are often the last to be hired and the first to be fired.<sup>325</sup> In family life, the ideology of male superiority still has a large purchase. According to the Survey conducted by *China Women's News* in 1996, 44.9% of men believe "if a wife is beaten, she must either have done something wrong or have been provocative."<sup>326</sup>

In the criminal justice system, the majority of the staff is male. These people have grown up in a society influenced by several thousands years of feudalism. Examples of historical and cultural support of the patriarchal family system can be seen easily.<sup>327</sup> While no studies exist showing the extent of this influence on them, their indifference to battered women is revealing. The many stories provided in this thesis are good illustrations of the indifference of the police to this problem, which shows that the ideology of the public/private divide is

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<sup>325</sup> *China Women's News*, "Gender Awareness and Policy Involvement", July 9, 1996, N3; "Female Candidates Face Embarrassment", October 3, 1996, N1; "After Government Institutions Display 'Red Plates' to Female Student Candidates", January 17, 1996, N2; "Equal Employment: A Revolution that Needs to Be Accomplished", May 12, 1998, N3; Ann D. Jordan, *supra* note 120, at 60.

<sup>326</sup> *China Women's News*, *supra* note 11.

<sup>327</sup> Take the incident of my domicile registration for example. After marriage, I applied to the responsible police agency for family registration and put my name as the head of household. However, when I got the registration passbook, I found that my husband had become the head of household. The police did not even bother to contact me when they changed the name.

glaringly reflected in the criminal justice system where socially biased members are over represented.

#### (d) The Media

As the most powerful and influential means of education and publicity in China, the media have a role to play in either promoting women's rights or reinforcing the stereotypical roles of men and women. The media's misleading propaganda of the stereotype of "the virtuous wife and mother" strengthens the unequal power relationships between husbands and wives and reinforces women's oppression in the home. Through government-controlled media, there are frequent reports about those "praiseworthy women" who have sacrificed their own interests and careers for those of their husbands in order that their husbands can devote themselves to their careers and be successful men. The signals such reports give is the continuity of the patriarchal idea that men's place is in the society and women's place is at home. It helps to reinforce the patriarchal familial ideology which devalues women's work and places women in a very disadvantaged position financially. When domestic abuse occurs, these women are left with no alternatives and literally no help from the state.<sup>328</sup> These misleading media messages perpetrate the problem.

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<sup>328</sup> I have a very good friend and neighbor whose ex-husband was and still is a manager in a successful business. In order to help him with his career, my friend who was also successful in her career quit her job and took all family responsibilities. Three years later, her husband had a mistress and forced her to a divorce with violence. He hid most of his money and did not want to provide her with a place to live although he had two apartments. Before I left for Canada in 1997, I asked a lawyer friend to represent her and tried to secure one of her husband's two apartments for her to stay before she was able to accommodate herself. Later I heard from her that the lawyer was successful in this respect, but she

Blaming the victims is often seen in media coverage of domestic violence stories.<sup>329</sup> The media treats these cases as isolated and individual ones, rather than as a part of a broader social problem. Such reporting tends to blame the battered woman for not knowing how to seek legal protection. One example is the case of Ren who was date-raped and had to marry Wei in 1989 to save face. Wei was very dominant after the marriage and Ren dared not say anything in retort. She hoped that when her baby was born, Wei would treat her better. Unfortunately, this did not happen. Violence became her frequent companion. One day, a young man called at their house looking for Wei. When he was told that Wei was not at home, the young man assailed Ren with obscenities. Ren kicked him out. Wei was enraged and accused Ren of offending his "god of wealth". He hit her across the face and punched her in the abdomen until she passed out. Ren filed for divorce in January 1996. Wei tried to force her to withdraw her divorce request, but when that proved unsuccessful, he poured sulfuric acid upon Ren. Within a few seconds, 80% of her skin was burned, her ear and nose tip were burned and her eyes could not close. An editorial blamed both Ren and Wei for the tragedy: "The main causes of this tragedy are that the victim did not know how to protect her legal rights" and the offender "was ignorant about

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"voluntarily" gave up her right to her son's custody since she has no income, no house and there is no welfare system to support her in China.

<sup>329</sup> *China Women's News*, *supra* note 123; Xue Ninglan, *supra* note 151, at 199-201; *Liaoning Legal Daily*, "It Is Cruel for the Husband to Abuse his Wife, but It Is not Right for the Abused Wife to Kill her Husband", April 21, 1995.

the laws".<sup>330</sup> An article on the *China Women's News* in 1995 mentioned a survey (a sample of 50 women battered by their ex-husbands) conducted by Heilongjiang Provincial Women's Federation. The survey found that only 11 of these women sought assistance from relevant agencies, 23 did not know how to have their injury measured by the police and 16 simply did not know what to do.<sup>331</sup> This article placed blame on the victims for not knowing how to use the law to protect their legal rights.<sup>332</sup> The media did not question whether necessary legal protection was accessible and the underlying causes of it.

The media has a tendency to report only good news. Since the mid-1980s, the government policy requires that news coverage be 80% positive and 20% negative.<sup>333</sup> The underlying reason for such a policy is the belief that negative reports will create unnecessary instability in the society. In practice, the negative proportion is said to be smaller than 20%.<sup>334</sup> Concerns about "saving face" for the authorities have led to the suppression of information which would otherwise reveal the extent of serious abuses.<sup>335</sup> The fact that the

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<sup>330</sup> *China Women's News*, "Raise Your Voice--Not Only for A Woman: The Case of Disfiguring and Cruelly Injuring the Wife Was on Trial in Harbin", July 8, 1996, N2.

<sup>331</sup> *China Women's News*, *supra* note 246.

<sup>332</sup> *Ibid.*

<sup>333</sup> *Human Rights in China*, *supra* note 176, at 89.

<sup>334</sup> *Ibid.*

<sup>335</sup> *Ibid.* at 286.

media is controlled by an internal government review system, which causes the under-reporting of domestic violence, to a large extent, hinders the real protection of women's personal rights in China.

(e) Social Indifference

Michael Dowd, Director of the Pace University Battered Women's Justice Center, said that "the legalized injustices of pre-modern times documented a societal state of mind not easily erased after being in place for centuries".<sup>336</sup> This is also true in China. The society is so indifferent to wife abuse that even the three women's liberation movements in China have never included domestic violence as a significant social issue, viewing it as a private matter.<sup>337</sup> It seems quite common for men to assume their patriarchal rights and women to internalize their inferiority. There are some well known old-fashioned notions about domestic violence in Chinese society, such as "Husbands and wives can come to peace right after they fight"; "There is nothing serious in spousal assault, it is like the 'fighting' of one's own upper teeth and lower teeth"; "Even an upright official cannot solve family dispute"; "Family shame should not be aired in public";<sup>338</sup> and "Social and legal interference is harmful to the reconciliation of the couple and may result in the breaking up

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<sup>336</sup> Michael Dowd, *supra* note 55, at 569.

<sup>337</sup> Human Rights in China, *supra* note 176, at 22.

<sup>338</sup> *China Women's News*, "The Society Must Not Be Indifferent to Domestic Violence", February 6, 1996, N1.

of a family".<sup>339</sup> These century-old notions have become strong arguments for not interfering in wife beating. Under these golden rules, wife beating has become something that is justified. For example, when a man tried to snatch a woman's purse in the street in Wu Han city in 1996, the woman yelled for help. Bystanders tried to intervene at first, but stopped when the man shouted "she is my wife" while hitting her. This so-called husband at last stole the woman's purse and fled.<sup>340</sup> There have been reported instances of men carrying their marriage certificates with them, so that when they beat their wives in public, they will be prepared to "protect their legal rights" should anyone try to intervene.<sup>341</sup> Neighbors refuse to provide witness testimony to battered women because they often do not want to interfere in a "private matter". This makes it very difficult for a battered woman to successfully win a private prosecution against her husband.

Indifferent and patriarchal social attitudes have a further detrimental impact on battered women themselves. Abused women tolerate violence because they believe it is part of married life. When one woman, who was hospitalized by the assault of her husband, sought help from a pro bono lawyer, all she wanted was "please ask him not to beat me so hard next time and not to beat where it shows."<sup>342</sup> The recent forensic analysis of 101

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<sup>339</sup> Traditionally, Chinese people believe it is better to remove ten temples than to break up a family. See Wu Miaohua, *supra* note 125, at 116.

<sup>340</sup> *China Women's News*, *supra* note 338.

<sup>341</sup> Jiang Xing, *supra* note 314.

<sup>342</sup> *Legal Daily*, March 12, 1997, N6.



severely abused women shows most victims of domestic violence endure spousal violence until the abuse goes beyond their tolerance or endangers their lives.<sup>343</sup>

Lack of governmental realization of the seriousness of wife assault is one of the main reasons why the criminal justice system neglects the protection of battered women. The lack of independence of Chinese women's organizations and the lack of independence of the media means an absence of feminist voices to highlight the seriousness of this issue. In addition, the deep-rooted ideology of patriarchy, which results in social acquiescence to domestic violence "encourages" men to beat their wives without fear of being punished. It also makes abused women feel that they can expect little protection from a society made up of individuals who resemble, at least in thought, the men who beat them. All these reasons contribute greatly to the overwhelming problem of violence against women in the home in China, thus seriously violating the human rights of women in China.

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<sup>343</sup> Lu Di & Zhang Fengqing, "Forensic Analysis of the 101 Victims of Wife Abuse: Forensic Assessment and Wife Beating", unpublished paper, *supra* note 4.

## Chapter Five: Suggestions And Conclusion

Domestic violence is a global issue that has drawn the attention of the international community. At the third global women's conference in 1985, the issue of domestic violence against women was included for the first time as an issue related to peace in the Nairobi Forward Looking Strategies. In the early 1990s, this issue gained priority as a human rights violation. In 1992, the United Nations Women's Committee adopted General Recommendation #19 on violence against women. The Committee elaborated on the responsibility of states for private acts of violence, holding the states liable for the violation of human rights if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence and to provide compensation. In 1993, the UN General Assembly adopted the *Declaration on the Elimination of Violence against Women*.<sup>344</sup> In 1995, the Fourth World Conference on Women was held in Beijing and it produced the *Platform for Action*<sup>345</sup> which reaffirmed that violence against women is an issue of human rights generally. It remains high among the priorities of the United Nations. At its sixth session in Vienna on April/May 1997, the United Nations Commission on Crime Prevention and Criminal Justice adopted a draft resolution on the elimination of violence against women entitled "*Model Strategies and Practical Measures*

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<sup>344</sup> *The United Nations Declaration on the Elimination of Violence against Women*, GA Res. 48/104, 23 February 1994.

<sup>345</sup> *Report of the Fourth World Conference on Women in Beijing*, 4-15 September, 1995 (A), CONF. 177/20 and Add. 1, Chap. I, res. 1, annex II.

on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice".<sup>346</sup> It was approved and adopted by the Economic and Social Council and eventually by the General Assembly in December 1997.<sup>347</sup> The resolution calls upon member States to review and evaluate *Criminal Law* and practice to determine if they have a negative impact on women, and if so, to modify them to ensure that women are treated fairly by the criminal justice system. The resolution further urges member states to develop and promote crime prevention strategies that reflect the realities of women's lives and address their distinct needs.

China is one of the first Member States that signed without reservation *The Convention on the Elimination of All Forms of Discrimination Against Women*<sup>348</sup> in 1980. China also participated in the drafting of the Nairobi Forward Looking Strategies.<sup>349</sup> Since its founding in 1949, the People's Republic of China has enacted a series of laws which aim to protect women's legal rights, promote gender equality, and punish and eliminate violence against women. The current legal system has the *PRC Constitution* as its core, an outer layer includes the *PRC Law on the Protection of Women's Rights and Interests*, the *PRC*

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<sup>346</sup> *Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice*, UN doc. E/CN. 15/1997/L.7/Rev. 1, May 6, 1997.

<sup>347</sup> *Model Strategies and Practical Measures on the Elimination of Violence against Women, in the Field of Crime Prevention and Criminal Justice* GA Res. 52/86, December 12, 1997.

<sup>348</sup> *The Convention on the Elimination of All Forms of Discrimination Against Women*, GA Res. 34/180, annex, December 18, 1979.

<sup>349</sup> Mo Chengzheng, "China's Basic Practice in Implementing International Covenants, Combating and Eliminating Violence Against Women" in Ma Yuan, ed., *supra* note 6, at 56-57.

*Criminal Law*, the *PRC General Provisions of the Civil Law*, the *PRC Administrative Law*, the *PRC Marriage law* and the *PRC Inheritance Law*. A still further layer includes 40 administrative regulations and 80 statutes. China has shown a strong belief at the official policy level that eliminating all forms of violence against women is not only required in the development of social stability in China, but also required in the protection of women's human rights and in the raising of women's status.<sup>350</sup> However, if the law is not enforced faithfully, it is only as good as the paper it is written on. The criminal justice system in China is deficient in enforcing the relevant laws on violence against women, for the reasons enumerated in this thesis, such as the lack of political will, patriarchal and public/private ideologies, lack of independent non-governmental women's organizations, etc. Based on the above reasons, the following suggestions are made in order to improve the law enforcement of the criminal justice system, to prevent and control this ugly social phenomenon.

a) Strong Political Will Is Prerequisite to Prevent and Control Wife Abuse in China.

To successfully combat this social problem, political will is extremely important in China where the legal system is not completely independent of executive power. The Government needs to recognize the seriousness of domestic violence and its harmful impact on women, children and the whole society. Prevention and control of crimes

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<sup>350</sup> *Ibid.* at 56.

against women whether in the public sphere or in the private sphere should be taken equally seriously without discrimination. As required by the United Nations Declaration on the Elimination of Violence against Women,<sup>351</sup> the government of China is obliged to eliminate violence against women, integrate gender awareness into its criminal policy and take all measures to prevent and punish acts of violence against women in the home.<sup>352</sup> It should provide access to the mechanisms of criminal justice and effective remedies.<sup>353</sup> Legal, political, administrative and cultural approaches to combat wife abuse should also be developed.<sup>354</sup> Further, it must make sure that adequate resources for the purpose of securing women a life without fear and physical injury are allocated,<sup>355</sup> and that those involved in implementing criminal justice policies receive gender sensitive training.<sup>356</sup> In addition, it ought to encourage research on the causes, nature, seriousness and consequences of domestic violence and make these statistics and findings of the research public.<sup>357</sup>

#### b) Make Wife Abuse A Specific Offense in the *Criminal Law*

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<sup>351</sup> *The United Nations Declaration on the Elimination of Violence against Women*, *supra* note 344.

<sup>352</sup> *Ibid.* art. 4 (c ).

<sup>353</sup> *Ibid.* art. 4 (d).

<sup>354</sup> *Ibid.* art. 4 (f).

<sup>355</sup> *Ibid.* art. 4 (h ).

<sup>356</sup> *Ibid.* art. 4 (i).

<sup>357</sup> *Ibid.* art. 4 (k).

In order to ensure effective enforcement of the criminal law with respect to wife abuse, giving the criminal justice system personnel no excuses to stay away from it, a specific offense of wife abuse should be included in the *PRC Criminal Law*. There have been different opinions so far as to whether a new law on violence against women is needed or only a specific definition in the *Criminal Law*. Some experts, scholars and judges have called for a new anti-domestic violence law, defining the offense of domestic violence to ensure that this kind of offense is punished.<sup>358</sup> Some others argue that new legislation may not necessarily guarantee an effective response from the criminal justice system for battered women.<sup>359</sup> If the criminal justice system again fails to implement the new law, what is the point of enacting a new law? Looking back, since the founding of the People's Republic of China, wife abuse, or maltreatment of family members as it is known in China, has been against the law, but the police, the courts and public officials have winked at it. Currently, China already has a specific law relating to women, but due to lack of operativeness, the real protection of women's personal rights still lies in the *Criminal Law*. In my view, a new law is not necessary, but a definition of wife abuse in the *Criminal Law* and the elimination of the principle that battery by one's husband is dealt with much more leniently than by strangers,<sup>360</sup> are more than necessary. If both are done, they will greatly

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<sup>358</sup> Liu Zhumei, "On Violence against Women in the Home" in Ma Yuan, ed., *supra* note 6, at 92; Wang Jingling, "Domestic Violence in the 21st Century and the Tendency of Sex Offense", unpublished paper, *supra* note 8, at 46; Yan Maokun, "On Domestic Violence" in Ma Yuan, ed., *supra* note 6, at 8.

<sup>359</sup> *China Women's News*, "Is the Law Really Unable to Intervene?: More Laws and Regulations Have Been Enacted, but Their Operativeness Has not Increased", February 2, 1996, N1.

<sup>360</sup> Ann D. Jordan, *supra* note 120, at 91.

help achieve the purpose of preventing and controlling wife abuse. The criminal justice system would have no excuses to exclude an abusive husband from punishment if his wife sustains injuries.

c) The Criminal Justice System Must Improve Its Law Enforcement

The criminal justice system should enforce the law without bias and where there is dereliction of duty, those who are responsible should be held accountable. It has been argued in this thesis that one of the causes of the failure to provide assistance to victims of wife abuse lies with enforcement. The police are the front-line workers who deal with domestic violence. They are the ones that battered women first come into contact with and they are also the ones that should provide timely help. Where there is a risk of any ongoing violence, abusers should be arrested to avoid the possible escalation of violence. Failure to provide adequate and efficient protection that results in serious injuries or death of the victims should be investigated and those responsible should be held accountable.

However, strong involvement by the police agency alone is not sufficient to solve the problem. The procuratorates should give timely approval to requests of arrest submitted by the police and initiate public prosecution without delay.<sup>361</sup> Abusers should be

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<sup>361</sup> Under the *Criminal Procedure Law*, a victim cannot terminate a public prosecution case because the prosecutor represents the state; if a victim refuses to testify, the prosecutor can still seek conviction of the suspect without her/his testimony. For instance, the prosecutor could demonstrate the victim's earlier oral statement (recorded by the police), testimony given by other witnesses or the victim's medical record.

strenuously prosecuted under the *Criminal Law*. Where a felony charge is dropped on the excuse of "alleviating family conflicts and improving marital relationship", the responsible prosecutor should bear the criminal liability under the offense of dereliction of duty.

I am unable to find, through my research, successful examples that an abuser who is not dealt with or has been dealt with leniently by the criminal justice system, could realize his unreasonable violence and change for the better. There are, however, many examples, as shown in this thesis, that when the criminal justice system at last decides to intervene, it is too late for the victim who is either disabled or dead. To be lenient with an offender is to be unjust to the victim. My opinion is the criminal justice system should be strict with domestic abusers so that even if an abuser does not correct his behavior, it is a deterrence or a warning to other ongoing and future abusers.

The courts also have a role to play in combating domestic violence. If the courts believe that wife abuse is merely family conflict and does not need judicial punishment, it will make the efforts of the police and procuratorate useless. What is more, the perpetrators would have nothing to fear and the personal rights of the survivors of domestic violence would be further violated. A strong admonishment, along with a stiff sentence, will make an abuser know what he is doing is not socially acceptable. The strict punishment of abusers is far more significant than just punishing the abusers, because it signals to the society that domestic violence is by no means "a domestic affair", but rather a serious criminal offense.



In addition, women and children's courts as one of the effective mechanisms to protect women's legal rights should be set up at different levels over the country. Arrangements should be made to have female judges work five days (instead of two days at present) a week to deal with wife assault cases in such tribunals, so as to provide speedy and essential assistance to victims of domestic violence.

To better achieve this goal, the criminal justice personnel involved in dealing with domestic violence should attend mandatory training on the unacceptability and dynamics of domestic violence, so that they know why a woman does not leave her violent marriage. Their frustration when battered women withdraw their complaints could also be addressed by explaining the reasons for such withdrawals. Furthermore, law schools should provide mandatory courses on wife abuse so that future police, prosecutors and judges have more accurate information on such issues.

#### d) Raising Gender Awareness in Both Sexes Is Vital to Reduce Wife Abuse

Public awareness of gender equality, especially men's sense of gender equality, is indispensable to the elimination of violence against women in the home. One of the reasons for the existence of domestic violence is the more or less patriarchal ideology that still prevails in society. The public/private divide reflects the old notion that "a wife is a man's private property". Excluding violent husbands from the crimes of intentional assault

reinforces the gendered ideology that a man is the master of his family. In order to protect women from domestic violence and to raise women's status in the family, it is not enough to raise women's consciousness of gender equality, but also that of men. Both women and men need to reconstruct their roles in the family/marriage.<sup>362</sup> A wife should not be expected to be a full time care-taker for the family while a husband should not be regarded as the head of a family, who is the main bread-earner and who thus has the right to discipline his wife if she does not meet his requirements. Women's complete emancipation only remains good on paper if men insist on exercising their patriarchal rights in practice. Only when men realize the importance of gender equality can women enjoy equal rights with men.

To achieve this goal, relevant agencies need to be actively involved. For instance, the Ministry of Justice, which is responsible for publicizing laws and regulations in the country, should increase its efforts to inform the general public that gender equality is a constitutional principle. Discrimination against women in implementing the law is prohibited and will be punished under the law. Women's federations at different levels should spare no efforts to promote public meetings and seminars on domestic violence, with the aim of creating and raising awareness that wife assault is a criminal offense and will not be tolerated by the society.

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<sup>362</sup> *China Women's News*, "The Misleading Female Image in the Media", June 2, 1995, N3.

### e) The Role of the Media Should Be Brought into Full Play

As a powerful tool of publicity, the role of the media in eliminating wife abuse should not be neglected. In the past, the media has successfully guided young couples in China to internalize the idea of family planning, which contributed significantly to the successful implementation of the birth control policy in China. Also, during the national efforts to fight against the enormous flood and relieve disaster in 1998, the media's numerous effective reports successfully ignited nationalism and united the nation together to control the flood and assist the relief of the poverty-stricken victims of the flood.<sup>363</sup> These achievements show that the media can be a strong force not only in raising gender awareness, but also in exposing and assisting the settlement of wife abuse cases, in providing a voice for survivors of violence, in informing victims of how to contact women's hot-lines and how to seek legal assistance, where to find women's shelters, and how to bring a private prosecution to court.

However, as Mr. Jiang Zhemín, the PRC President, pointed out, when he was inspecting the Publishing House of People's Daily in 1996, "When the mass media gives correct guidance, it is a blessing to the Party and the people; but when the mass media is misleading, it is a disaster to the Party and the people".<sup>364</sup> The message the media gives is

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<sup>363</sup> *China Women's News*, "Media's Role in Reducing Disaster Is Huge", October 13, 1998, N1.

<sup>364</sup> *China Women's News*, "Media Should Provide Correct Guidance", September 27, 1996, N1.

of vital importance to the elimination of violence against women in the home. Journalists should have gender awareness and educate women how to seek assistance instead of blaming victims for being too weak, too dependent and too ignorant of law. The media should educate its readers about the criminal nature of wife abuse and editorials should comment on wife abuse cases from a feminist perspective and exercise their function of "public opinion supervision"<sup>365</sup> by holding the relevant institutions accountable and by pointing out the failure of the criminal justice system.

The media should also play the role of tearing away the shroud of secrecy that abusers hide behind. What abusers fear most is the publicity about their wife beating activities at home. Often, even brutal abusers appear to be good individuals in other people's eyes. There would not be so many abusers if they knew their friends, colleagues and neighbors were going to know what kind of people they really are within their family.<sup>366</sup> Therefore, it could be helpful that after the close of domestic violence cases, the court publicizes in local newspapers the names of abusers and the sentences they receive. To unexposed abusers, this kind of publicity is a warning; to potential abusers, it is a preventive inoculation; to the society at large, it is also an effective consciousness raising about anti-violence against women.<sup>367</sup>

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<sup>365</sup> The concept of public opinion supervision in China is similar to public education, but goes beyond it. The powerful effect of exposure in the media can almost bring instant results in a specific case.

<sup>366</sup> Captain Robert L. Snow, *Family Abuse: Tough Solution to Stop the Violence* (1997) New York: Plenum Trade, at 274-275.

<sup>367</sup> *Ibid.*

f) The Use of Mediation Should Be Avoided in Wife Abuse Cases

Mediators, especially people's mediators who are not legally trained, should not try to reconcile a couple if there is evidence of wife abuse. Whether divorce is in the best interest of the parties concerned is up to the couple to decide. No one should be kept within his/her miserable marriage for the sake of social stability, which is the responsibility of the state. Given the disadvantages enumerated in the Chapter One, people's mediators should stay away from marriage disputes involving wife assault, let alone getting actively involved without invitation. The judicial practice that all divorce petitions should be mediated first and if one spouse does not wish to leave the marriage, the couple should separate for at least 6 months to "cool down" before a grant of divorce may be given should be abandoned, let alone the suggested separation period of 3 years in the draft revision of the *Marriage Law*. In dealing with divorce cases due to wife abuse, if a victim suffers from serious bodily injuries, a divorce decree should be granted immediately, and the dividing of the couple's mutual assets should be in the interests of the wife and her child. The case should then be referred to the criminal prosecution section.<sup>368</sup> An abusive husband should not only be held accountable for his violence, but should also have to pay compensation to his victim.<sup>369</sup>

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<sup>368</sup> In every people's court in China, there are four sections: the criminal litigation section, the civil action section, the business litigation section and the administrative litigation section.

<sup>369</sup> A recent case is: Ms. Dong Yinghua charged her husband with intentional assault. A district court in Beijing ruled on September 16, 1998 that her husband was guilty of intentional assault and he was

g) International Expertise with Respect to Changing the Justice System's Response to Wife Abuse Should Be Sought

China should seek expertise and useful experiences from other countries. Canada, the US, Australia and Great Britain have studied domestic violence for some time and have acquired considerable expertise. China could gain useful experience from these countries. For example, like the police hot-line services in these countries, the "110" hot-lines in China should also respond to emergency calls from victims of wife-beating, and similar police protocols should be made to make on-the-spot arrests of the abusers if the victim sustains injury. Also, the mandatory "no drop charge" prosecuting policy enforced in some jurisdictions, such as British Columbia, ought to be integrated in China's context despite its controversy in North America, because dealing with wife abuse outside the criminal justice system has proved ineffective in practice.<sup>370</sup> The offense of maltreatment of family members should be removed from the category of private prosecution and made a mandatory public prosecution,<sup>371</sup> since the nature of the relationship between the abuser

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sentenced to 15 years of imprisonment besides having to pay a large sum of compensation to his battered wife. See *Beijing Youth Daily*, "Wife-Burning, the Husband Was Sentenced to 15 years in Jail", September 17, 1998, N1.

<sup>370</sup> The B.C. Ministry of Attorney General, *supra* note 89, at 2.

<sup>371</sup> The current controversy in North America does not seem to be a major problem in the Chinese context. It is so for the following reasons: a) Few women in China would report if the abuse is not beyond their tolerance due to traditional background. When they do report, the abuse is excessive as the cases mentioned in the thesis show. It will then be in their best interest as well as the society's best interest for the criminal justice system to intervene; b) While economic dependency is a problem for some battered women, it is not for most others in China. 57.55 million women in China (44% of the whole working population, which is higher than the average 34.5% in the world) have jobs and it is not rare for some women to earn more than their husbands. Therefore, while some women might be exposed to the harms of these policies, the potential benefits for the majority will outweigh the potential harms.

and his victim is one in which the abuser imposes his will upon the victim. Limiting the victim's responsibility in imposing legal sanctions on the abuser decreases his ability to manipulate the system to avoid punishment.

In addition, useful elements should be extracted from Battered Woman Syndrome and made applicable in China's context. Art. 20 of the *PRC Criminal Law* which requires self-defense be used to repel an imminent illegal act only should not be applied to battered women for the following reasons: a) since the victim is physically weaker than the attacker and long time abuse has often created a "learned helplessness" in some abused women, it is almost impossible for her to successfully fight back should she wait until her life is in imminent danger; b) such homicides have specific characteristics: most battered women are forced to kill their violent husbands for self-protection because the criminal justice system tends or chooses to ignore such "domestic affairs". In other words, a woman's violence is often an act of self-defense. For instance, Sheng was abused for many years by her husband who was the executive administrator of the county they lived. Many times she had contacted relevant agencies and asked for intervention. Her problem was never solved. In despair, she hired someone and killed her violent husband. She was immediately prosecuted and sentenced to death by the criminal justice system<sup>372</sup> which had refused to provide help when she desperately needed it. As such, the responsibility should be borne by the criminal justice system that fails to protect the victim. How does this criminal policy

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<sup>372</sup> Su Liming, "Strengthening of the Protection of Women's Rights from the Perspective of Female Offenders", unpublished paper, *supra* note 4.

reflect the state's protection of battered women and how is justice achieved if, when a woman is battered, she gets no assistance, but when she fights back for her life, she is punished by the same system that fails to protect her? Therefore, to achieve justice for battered women, especially those who killed or assaulted their abusive husbands because of repeated failure to obtain legal intervention, a woman's history of abuse, financial constraints and lack of legal assistance should be taken into account in the trial, either as evidence relating to self-defense or as a mitigating circumstance..

This is feasible in China as China already has similar regional judicial practices. For instance, Yuan's husband was extremely abusive. Since their marriage in 1980, her husband would use any tool he had at hand to torture her both at home and in her workplace. She tried to kill herself in 1983 with no success. After that, her husband threatened to kill her parents if she ever tried to commit suicide again. Thus she could neither live a normal life nor choose to die. On 17 April, 1992, her husband tried to beat her in her workplace but was stopped by a guard. He injured the guard but ordered Yuan to make the guard apologize within 10 days, or he would kill her boss and her parents. On 27 April, he sharpened his knife and said he would kill her boss and her parents the next day. Yuan had every reason to believe him. In order that innocent people would not die for her sake, she killed him with a kitchen knife before he woke up the next morning. Her mother-in-law not only hired the best lawyer in the locality to defend her, but also went to court to be a witness on her side. Yuan also had huge public sympathy and support. Yuan's prolonged abuse from her husband was finally accepted by the local court



as a mitigating circumstance and she was sentenced to 3 years in jail with 4 years suspension on July 17, 1992.<sup>373</sup>

The legal right of a man to beat his wife is no longer explicitly recognized by law, but the legacy of this patriarchal right continues into private homes in today's Chinese society. Feminist theories on domestic violence have not yet been established in China, but fortunately there is a developing social consensus that wife abuse is a social problem that needs immediate attention from the state and the criminal justice system. Although the PRC *Criminal Law* does not explicitly exclude the husband from the offense of intentional assault causing physical injury, several factors prevent the husband from being charged and punished: the state does not have adequate will to curb this violation of women's personal rights, the lack of independent women's organizations, the law is not specific in terms of the criminalization of wife beating, the enforcement personnel are patriarchal and do not often enforce the law, the male dominant society is indifferent to and tolerates wife beating, and the media gives misleading message concerning what is a good wife. All these factors play a part in the exclusion of an abusive husband from the punishment of the law and of the exclusion of a battered wife from the protection of the law in China. To control this phenomenon, ideas generated through feminist engagement with the criminal justice system should be adopted in making macrostructural criminal policy. Legislative reform is necessary, but the involvement of political will and all sectors of the society are vital for

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<sup>373</sup> *Inner Mongolia Legal Daily*, "A Virtuous Woman Killed Her Abusive Husband", September 29, 1992, N1.

substantial gender equality in the private sphere. As Professor Susan B Boyd, Chair of Feminist Legal Studies at UBC, pointed out, "law is neither the ultimate oppressor of women nor the ultimate means to resolve that oppression. Rather it is situated within the complex set of relations that we call society and state".<sup>374</sup> Without a strong political will, this phenomenon is most likely to get worse in China. Judging from the current situation, the road to the protection of women against spousal violence in China is long and the burden is heavy.

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<sup>374</sup> Susan B. Boyd, *supra* note 27, at 46.

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