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Contextualising the Rhetoric of Sexual Violence in Hong Kong

CHIU Man-chung

This article adopts a postmodern/postcolonial feminist perspective in analysing the effect of the cancellation of marital rape exemption in Hong Kong in 2002. Besides exploring the patriarchal ideology which underlies Hong Kong's legal system, the author argues that neither white western feminist strategies nor Foucauldian de-sexualisation can easily substantiate (gender) justice in Hong Kong. The author further argues that any legal reforms in Hong Kong should be examined in the light of Han Chinese culture.

The Hong Kong Special Administrative Region (SAR) government started public consultation on whether and how marital rape immunity should be cancelled in 2000. This article critically scrutinises the “new” offence — marital rape — from a cultural/socio/legal perspective. By couching the discussion within the multiple and intertwined contexts of gender politics, legal studies, postmodern philosophy and postcolonialism, the author argues that in order to substantiate the targets of law reform, mechanism of gender subjectivity (re)construction and process of (legal) localisation, the political interaction among different discourses must be recognised. The article thus aims to explore the limitation of the recent legal reform and gender injustice (re)constituted within the system of sexual violence law. The author argues that any discussion of, or amendments to the law must be localised within the indigenous socio-cultural context, lest they become simple mechanical modifications and the intended

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influences on everyday gender dynamics and the struggle between husband-rapists and wife-victims remains unaddressed.

The article begins with an investigation of the current marital rape law in Hong Kong. It adopts Anglo-American socio-legal critical theories in the analysis of (1) legal concepts which (re)produce gender injustice; and (2) the inter-dynamics between different ideologies. In the conclusion, the engagement between indigenous Hong Kong Han Chinese culture and the (proposed) legal reform is examined.

Current Legal Situation in Hong Kong

In Hong Kong, rape is defined by Section 118 (3) of the Crimes Ordinance as, “A man commits rape if (a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and (b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it.”¹

The phrase “unlawful sexual intercourse” in the statute had been held to mean “intercourse outside the bonds of marriage”. The interpretation was the consequence of Sir Matthew Hale CJ’s statement made in 1736:

The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by *their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract*.² (emphasis added)

The first reported case involving marital exemption was in the *R v. Clarence* case in 1889.³ After nearly a century, in England, the exemption was abandoned in case *R v. R*.⁴ The European Court of Human Rights reconfirmed the judgement in 1995.⁵

Since *R v. R*, the Law Commission in England has recommended that marital rape should be the subject of legislation in order to confirm the decision of the House of Lords. As a consequence, the 1956 Sexual Offences Act was amended by section 142 of the Criminal Justice and Public Order Act 1994:

¹ Cap 200 LHK.

² 1 Hale 629.

³ [1889] 22 QBD 23.

⁴ [1991] 1 All ER 747.

⁵ *R v. R* is referred to as *CR v. UK* Publ ECHR Ser A, No. 335-C in the European Court of Human Rights.

the term “unlawful” was abolished to remove ambiguity created by the statutory wording.

The rape law in Hong Kong remained unchanged, however. Finally, on 4 July 2002, the related sections were amended. The Hong Kong Legislative Council adopted the so-called “minimalist” approach,⁶ i.e., the exemption of marital rape was abolished by adding two statutory provisions: Section 117(1B) and Section 118(3A), thus expanding the meaning of “unlawful sexual intercourse” to cover marital vaginal penetration:

117(1B) For the avoidance of doubt, it is declared that for the purposes of sections 118, 119, 120 and 121 and without affecting the generality of any other provisions of this Part, ‘unlawful sexual intercourse’ does not exclude sexual intercourse that a man has with his wife.

118(3A) For the avoidance of doubt, and without limiting the generality of any other section, it is declared that in subsection (3)(a), ‘unlawful sexual intercourse’ includes sexual intercourse between a husband and his wife.

The questions now are, can the abolition bring any changes to the lives of married couples in contemporary Hong Kong (where wife abuse/marital rape happens) or to male-dominating heterosexist hegemony? After the abolition of marital rape exemption, will sexual offence laws then reconstruct and reproduce gender justice where no particular gender identity is suppressed and/or discriminated against?

Legal (Re)construction of Patriarchy: Feminist Criticism on (Marital) Rape

Since the victims of marital rape not only suffer sexual assault but also wife abuse, analysis of marital rape must therefore be engaged within two different but inter-related contexts: marriage and sexual assault against women.

In legal discourse, marriage is viewed as a private and fair contract between two parties of the opposite sex, and due to the liberal binarism of private/public, the courts in theory would not question the terms of the marital contract.⁷ However, the law in fact asserts tight control over the formation of the contract, including the gender identity of the parties⁸ and the blood relationship between them.⁹ Also, if

⁶ LC Paper No. CB(2)1619/01/02(01).

⁷ Katherine O'Donovan, *Family Law Matters* (London: Pluto Press, 1993).

⁸ *Corbett v. Corbett* [1970] 2 All ER 33.

⁹ Section 27, Marriage Ordinance (Cap 181 LHK).

the marriage fails to conduct consummation, or if the wife is pregnant by another man (not her husband) at the time of the marriage, the marriage could become void.¹⁰ The definition of consummation and adultery, which can lead to divorce, is restricted to vaginal penetration.¹¹ Put simply, law has defined the parties who are legally capable of forming the marital contract and what should or should not be done given the marital (sexual) relationship.

From a contemporary feminist perspective, the purpose of such legal constraints is to guarantee the integrity of the husband's family name and the reproduction of (male) heirs for the husband's family: vaginal consummation becomes a necessary ritual and either adultery or pregnancy before marriage by a man other than her husband, is not allowed.¹² Further, in the tortuous liability of enticement, only the husband has the right to sue for damages, as another man deprives him of enjoying the (sexual) service provided by his wife. In legal discourse, the husband is head of *his* family, the master of *his* wife.

A woman's subjectivity after marriage is, in other words, marginalised. As William Blackstone writes in *Commentaries on the Laws of England*, a wife becomes part of the husband's body and thus lives beneath his wings and under his protection. The laws also neglected her consent to sexual intercourse. Since she needed to continue to honour the integrity and goodwill of her husband's family name, and because she was part of his body, she had the obligation to fulfil his sexual desire. It was in this context that rape was once a ritual of marriage.¹³

Since the victims of marital rape, as Glanville Williams claims, are likely to feel regretful when their husband-rapists are sentenced to a long spell in the prison,¹⁴ it is asserted that there is always a possibility, if the exemption of rape is cancelled, that vindictive or unscrupulous wives may bring a malicious prosecution based on fabricated evidence.¹⁵

The legal attitude towards a wife-victim in the case of marital rape is consistent with its assumptions about women. The law always assumes

¹⁰ Section 20, Matrimonial Causes Ordinance (Cap 179 LHK).

¹¹ Joseph Jackson, ed., *Rayden and Jackson's Law and Practice in Divorce and Family Matters* (15th ed.) (London: Butterworths, 1988), p. 228.

¹² William Blackstone, *Commentaries on the Laws of England* (Chicago: University of Chicago Press, 1978), p. 442.

¹³ Marilyn Yalom, *A History of the Wife* (New York: Harper Collins, 2001), p. 29.

¹⁴ Glanville Williams, "Rape is Rape", *New Law Journal* 10 (1992): 11.

¹⁵ *R v. J — (rape: marital exemption)* [1991] 1 All ER 759 at 765, per Rougier J.

that women are “weak and lustful”.¹⁶ In order to clarify whether a female victim consented, the court would not trust her statement without looking into her “past sexual history/behaviour”. This is how the judgement of *DPP v. Morgan* emerged.¹⁷ The court in this case decided that an honest belief in consent, however unreasonable, would negate the *mens rea* which constitutes the offence of rape. This is the famous defence of “mistaken belief in consent”.¹⁸

In order to prove the honest (perhaps yet unreasonable) knowledge of consent, the defendant hence sometimes goes to the past sexual history of the complainant, claiming that based on her past sexual behaviour, it was logical for him to draw the conclusion that she consented to sexual intercourse.¹⁹

This defence does not only problematise the victim’s creditability, it also exposes her own record of sexual activity to public examination without her consent. It is for this reason that contemporary feminists often refer to a rape trial as a “second rape”.²⁰

The legal discourse on rape, in other words, does not respect female victims’ sexual autonomy. Their statement is deemed untrustworthy, and their actual bodily harm is not adequately articulated. If it were not the case, the law should define non-consented penetration with reference to female vagina only, not the substance of penetration (i.e., penis). If the vagina is adopted as the reference, then forceful vaginal penetration by substances other than the penis, such as finger, dildo and bottle, should also be recognised as rape. The penis is used as a reference only because such intercourse could bring (natural) pregnancy and possibly contaminate the husband’s family name with the unexpected production of a child whose father is not the husband. The *de facto* interest protected by the rape law and trial is thus in the interest of men — the women’s (future)

¹⁶ Vivian Fox, “Historical Perspective on Violence Against Women”, *Journal of International Women’s Studies* 4, no. 1 (2002): 15, 18. See also Jane Ussher, *Fantasies of Femininity: Reframing the Boundaries of Sex* (New Brunswick: Rutgers University Press, 1997).

¹⁷ [1975] 2 All ER 347.

¹⁸ For more details, please see Jennifer Temkin, *Rape and the Legal Process* (London: Sweet and Maxwell, 1987), p. 84.

¹⁹ Caroline Forell and Donna Matthews, *A Law of Her Own: The Reasonable Woman as a Measure of Man* (New York: New York University Press, 2000), p. 237.

²⁰ “Stop Rape Trial Ordeals”, *BBC News Online* <<http://news/bbc.co/1/hi/uk/scotland/788649.stm>> [1 Nov. 2002].

husbands.²¹ Rape, in the eyes of feminists, is hence seen as a man wanting to assert power to dominate and possess.²²

Hong Kong laws, which are liberal-legal derivations, seem to defend strongly the private/public binarism and the “harm principle”. However, the way they demarcate the private/public arena also demonstrates the power of certain assumptions about sexual matters. A number of cases show how the Hong Kong legal system intrudes the private arena and normalises/(re)produces heterosexism. For example, buggery would not be considered as adultery, and only vaginal penetration would be considered as a lawful marital consummation and unlawful rape. Sodomy was not decriminalised until 1991, and same sex marriage is not allowed. The offence of male-only gross indecency is still effective, and the age of consent in the case of buggery (21 years) is higher than that of vaginal intercourse (16 years). By legitimising the heterosexual reproductive-centric perspective as the monolithic “law”/“script” of sexuality, male-heterosexist-domination permeates through the legal system and every concept and action which goes against the script. For example, the non-reproductive and non-heterosexual intercourse, would be pathologised. Only by repetitively (re)producing and problematising the others — the non-reproductive same sex erotic behaviour, for instance — patriarchal heterosexism establishes its authority. When analysing the criminal law in England and Wales, Nicola Lacey made a similar observation:

Crucially, both the ‘normal’ and ‘deviant’ sexualities of those with male and female bodies are very different...

The recourses for this kind of reading ... lie in the structure and substance of offences, with their messages about normal sexualities and relative power and autonomy of different sexual subjects.²³

²¹ This argument has been put forward by many feminists, and could successfully explain the existence of criminal conversation, enticement and harbouring. See Carol Smart, *Feminism and the Power of Law* (London: Routledge and Edwards, 1989); and Susan Edwards, *Sex and Gender in the Legal Process* (Oxford: Blackwell Press, 1996). Note that although the Matrimonial Causes (Amendment) Bill 1994 was passed in the Legislative Council on 17 May 1995, and no one is entitled to claim damages from any person who is involved in adultery with one’s wife or husband, the action for enticement in common law still exists in Hong Kong. For details, please refer to Ng Man Kin, “Damages for Harbouring and Enticement”, *Hong Kong Lawyer* 17 (Aug. 1995).

²² Susan Brownmiller, *Against Our Will: Men, Women and Rape* (London: Penguin, 1991).

²³ Nicola Lacey, “Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law”, *Canadian Journal of Law and Jurisprudence* 11 (1998): 47, 51.

The rape law further strengthens the authenticity of such heterosexist-patriarchal socio-legal script. Men, who are supposed to be rational, are assumed to be sexually aggressive, and it is therefore women's responsibility not to arouse the male sexual desire. Law courts would decide that the "victims" consented to have sexual intercourse with the defendants if the "victims" have promiscuous past sexual history/behaviour/activities.

De-sexualisation of (Rape) Law: Foucauldian Strategy of Resistance

The contemporary (legal) language of rape represents and reconstructs the male dominating hierarchal structure in which women position themselves as endangered, violable and fearful and invite men to position themselves as legitimately powerful and violent. As Sharon Marcus argues, the rape script takes its form as a "gendered grammar of violence". This grammar induces men to (re)recognise their gendered selves in images and narratives of aggression in which they are agents of violence who either initiate violence or respond violently when threatened. The grammar assigns women a disadvantageous position in the rape script because it identifies them as objects of male power and violence.

By engaging Marcus' argument with the "performative" theory developed by Judith Butler, we can obtain a clearer picture of how the non-stop formulation of gender identity works. In her book *Gender Trouble: Feminism and Subversion of Identity*, she argues that gender, as subjectivity, is not a cultural inscription of meaning on a pre-given body. In other words, the categories of "women", "men", "queer", "*tongzhi*",²⁴ and "transgender" are categories of meaning constituted in a non-fixed specific socio-political context. Instead, it is the "performance", such as representation within legal procedure and rape trial, which the notion of "gender" is continuously constructing and contesting. Thus, (marital) rape and related legal procedure cannot be said to be an "expression" of an "underlying core gender nature" of (heterosexual) men/husbands, but only one of the performances by which the subjectivity of patriarchal (-heterosexist) men /husbands could be constituted.

The power of the legal system comes from its repetitiveness in prosecutions, cross-examinations and application of legal principles.²⁵ It is through these sorts

²⁴ "*Tongzhi*" refers to people in Mainland China, Taiwan and Hong Kong who emphasise their indigenous cultural identities and localised strategy in resisting heterosexism.

²⁵ Judith Butler, "Ruled Out: Vocabularies of the Censor", in *Censorship and Silencing: Issues and Debates*, ed. Robert Post (Los Angeles: The Getty Research Institute for the History of Art and the Humanities, 1998), p. 256.

of ongoing legal-linguistic mechanisms that the constitution/dynamics of gender identities are engineered, and in this context that Carol Smart and Sue Lees argue that legal discourse reproduces/polices normal/patriarchal wo-man subjectivity.²⁶ In short, the “gendered grammar of violence” provides the script for people to follow and perform in the context of legal procedure/system. The repetitive performance reproduces the gender identities which are prescribed by the “grammar” and authenticity of the script. The loop continues and it seems that patriarchy is strongly entrenched. However, Foucault reminds us that:

... as soon as there is a power relation, there is the possibility of resistance.²⁷

Marcus further suggests an alternative strategy of resistance, namely the rewriting of the socio-legal script of rape. In the view of postmodern philosophers, a re-write could start with de-sexualisation of the crime, thus going beyond any kind of gendered hierarchical binarism. As advocated by Foucault, it could be a possible starting point:

It is the agency of sex that we must break away from, if we aim — through a tactical reversal of the various mechanism of sexuality — to counter the grips of power with the claims of bodies, pleasures, and knowledge, in their multiplicity and their possibility of resistance.²⁸

This suggestion is usually termed as “de-sexualisation” and stems from the arguments proposed by Foucault in his famous work, *History of Sexuality*.²⁹ He argues that the notion of sexuality has been historically produced and deployed throughout our society through the operation of power/knowledge networks, i.e., legal discourse. Through this mechanism, sexuality further becomes the thematic definition of subjectivity:

... since Christianity, Western civilisation has not stopped saying, ‘To know who you are, know what your sexuality is about.’ Sex has always been the centre where our ‘truth’ of the human subjects has been tied up along with the development of our species.³⁰

²⁶ Carol Smart, *Feminism and the Power of Law*; Sue Lees, *Carnal Knowledge: Ape on Trial* (London: Hamish Hamilton, 1996).

²⁷ Michel Foucault, *Foucault Live — Collected Interviews, 1961–1984*, ed. Sylvere Lotringer (New York: Semiotext[e], 1996), p. 224.

²⁸ Michel Foucault, *The History of Sexuality Vol. 1* (New York: Vintage, 1978), p. 157.

²⁹ *Ibid.*

³⁰ Foucault, *Foucault Live — Collected Interviews*, p. 214.

Foucauldian de-sexualisation strives against the authenticity of sexuality in the re-construction of subjectivity. In legal terms, it does not only mean anti-discrimination or cancellation of gender stereotyping, but acceptance and tolerance of multiple sexual choices. The de-sexualisation of the law therefore means sexuality (not sexual action, such as rape), under all circumstances should not be subject to any legal regulations, i.e., the law should accept and tolerate multiple sexual behaviours. Thus, phallogentric heterosexism, which marginalises all non-penile-vaginal-penetrative sexual activities, should cease to be essential to the legal system in Hong Kong. In adopting de-sexualisation as a perspective in examining the current laws in Hong Kong, the following questions arise: Why would the validity of marriage, as a private contract between two people, be related to sexual consummation and the ability to have sexual intercourse? Why would marriage be linked with the gender identities of the parties involved? Why would laws intervene in sadomasochism activities where all parties involved consented? Why would laws legalise only adult sexual activities, while putting up barriers for the sexual expression of minors? Why would laws control and censor pornography? Why would the age of consent in the case of vaginal penetration be different from that for contract formation? Why do the laws state that only women can be raped?

In short, as a subversion to the mainstream dominant deployment of sexuality, Foucault seems to be arguing that we should refuse to see the sex organs of our bodies as anything more than or different from another part of the body:

... sexuality can in no circumstances be the object of punishment. And when one punishes rape one should be punishing physical violence and nothing but that ... there is no difference, in principle, between sticking one's fist into someone's face or one's penis into their sex.³¹

Put simply, under Foucauldian de-sexualisation, sexual offences should be reduced to the crime of common assault, and gender specificity should also be deleted. De-sexualisation would also sensitise law towards the different and multiple gender identities of both victims and rapists, and therefore protect the victims of different kinds of "rape" (assault), including not only marital rape, but also same sex rape, male rape, trans-sexual rape, etc.³²

³¹ Lawrence Kritzman, *Michel Foucault: Politics, Philosophy and Culture: Interviews and Other Writings* (London: Routledge, 1988), p. 200.

³² Ronald Berger *et al.*, "Rape-Law Reform: Its Nature, Origins, and Impact", in *Rape and Society: Readings on the Problem of Sexual Assault*, ed. Patricia Searles and Ronald Berger (New York: Harper Collins, 1995), p. 225. See also Section 61I of Australian NSW Crimes Act 1900.

If the crime is de-sexualised and reduced into common assault, then evidence of past sexual history should become less relevant. If a person is punched more than once, does that mean she/he could be punched (lawfully) when the crime happened? The same logic applies and an analogy is formed: perhaps the victim was/is sexually active or even had intercourse with the accused before. That does not mean the victim would have consented to have sexual intercourse with the accused when the alleged tragedy occurred.

Representation of Gender Power Politics: Feminism against De-sexualisation

Ralph Sandland poses a criticism against de-sexualisation. When analysing the effect of *R v. R*, he rightly points out that de-sexualisation neglects the inequality of power existing between women and men. He said:

The relevance of this to the present discussion is that *R v. R* reminds us that de-sexualisation as a general strategy is of problematic and uncertain application because *sex is not a 'thing' but a relation and so the implementation of a particular approach will impact differently upon the various actors involved...* It can (and has) be argued forcibly that the de-sexualisation of rape as a strategy fails to consider the very real power differences between men and women.³³ (emphasis added)

This criticism provides a very accurate observation of Foucault's suggestion. Foucauldian theory concentrates on discussing only the action of rape, the organs involved and the deployment of the powerful notion of sexuality. He fails to embed his argument within the discourse of gender power politics. As Susan Brownmiller says in *Against Our Will*, the fact that a man can sexually assault a woman indicates that he overpowers her. A law de-sexualising rape could sustain this kind of gender violence by totally neglecting the existing imbalance of power within the political discourse of sexuality.

Taking the gender violence/power dynamics into account, legal reforms proposed by feminists have paid special attention to the definitions of "sexual act". For example, in Canada, a "new" law implemented in 1983 replaced the crime of rape with three offences: (1) Sexual Assault I; (2) Sexual Assault II (sexual assault with a weapon, threats to a third party, or causing bodily harm); and (3) Sexual Assault III (aggravated sexual assault). As it does not provide any

³³ Ralph Sandland, "Between 'Truth' and 'Difference': Poststructuralism, Law and the Power of Feminism", *Feminist Legal Studies* III, no. 1 (1995): 35–6.

specific definition of “sexual act”, non-consented vaginal penetration is not solely considered a serious sexual offence.

Feminists also aim to re-construct the relationship between consent and sexual assault by providing a positive definition of “consent”. An example is the Australian law of sexual assault. The Victorian Crimes Act (1958) defines sexual intercourse without consent as intercourse without the complainant’s “free agreement”.³⁴ Section 36 lists a series of conditions where a person would not be regarded as giving free consent to sexual intercourse: duress, unlawful detention, mistake related to the identity or nature of the act... The list is not exhaustive. According to Section 37:

In jury direction on consent in a relevant case, the judge must alert the jury that (a) the fact that a person did not say or do anything to indicate free agreement to a sexual act is normally enough to show that the act took place without that person’s free agreement.

Section 37, as Simon Bronitt said, is “a significant reform because it challenges traditional social attitudes about dominance and submission”.³⁵ The “new” law thus represents an independent women’s subjectivity and sexual autonomy. In short, whether a woman consents or not is no longer defined by the patriarchal perspective on heterosexuality.

The United Kingdom adopts a similar strategy. In the reform proposal, “Protecting the Public”, released on 19 November 2002 in London, the Labour Government also adopted the same approach suggesting that in a rape trial where “the prosecution could prove that the alleged victim was subjected to force or threats”, or she was “unconscious, unlawfully detained, unable to communicate because of a disability, or had agreement to sex provided on her behalf by a third party”, the jury “*must* assume consent had not been given”, and that the defendant would have to prove that he has taken reasonable steps to ensure his sexual partner had given the consent to have sexual activity.³⁶

Although the idea was not finally accepted, the Hong Kong SAR Government once also proposed providing a positive meaning for “consent”:

³⁴ Section 36.

³⁵ Simon Bronitt, *The Direction of Rape Law in Australia: Toward A Positive Consent Standard* (1995) <<http://law.anu.edu.au/criminet/tartrape2.html>> [5 Nov. 2002].

³⁶ Gaby Hinsliff and Martin Bright, “Law to Crack Down on Date Rape”, *Guardian Online* <<http://politics.guardian.co.uk/homeaffairs/story/0,11026,820277,00.html>> [1 Nov. 2002] (emphasis added).

‘consent’ means a free genuine and subsisting agreement to the act, and the agreement (a) may be expressed or implied; and (b) may be evidenced by words or conduct, whether present or past.³⁷

However, a mere rewrite of the law cannot necessarily bring a successful realisation of reform principles, i.e., the (re)construction and representation of woman/victim’s independent subjectivity in the discourse of sex(uality)/sexual assault. It was hoped that the Canadian legal reform in the 1980s, besides cancelling the offence of rape and introducing “sexual assault” of different degrees, would also provide a so-called “rape shield”, which tries to limit the defendant’s right to cross-examine the complainant’s past sexual history.³⁸ The judges however critically challenged it. In *R v. Dickson*,³⁹ it was also stated that “[e]vidence of a sexual relationship between an accused and a complainant proximate in time to the offences alleged might well support a defence of honest but mistaken belief in consent in some circumstances”.⁴⁰ In *R v. Seaboyer*,⁴¹ Madame Justice Beverley McLachlin, though disagreeing that past sexual history could be used against sexually-active women, held that “the exclusion of the kinds of exculpatory evidence posited in her judgement *violates* the accused’s ‘right’ to make full answer and defence” in accordance with the right to a fair trial, guaranteed by Section 7 of the Canadian Charter of Rights and Freedoms.⁴² With the strong request of the Canadian

³⁷ Section 117(1C), The Bill of Statute Law (Miscellaneous Provisions) Ordinances 2001.

³⁸ Sections 276 and 277, Canadian Criminal Code.

³⁹ 81 CCC (3d) 224.

⁴⁰ 81 CCC (3d) 224, per Prowse JA. However, note that the court has also provided certain restrictions on the admission of evidence of prior sexual conduct: the evidence cannot be regarded as “probative of issues involving the complainant’s credibility of the fact that she more readily consented” (*R v. Fija* 87 CCC (3d) 377, 379 per McFadyen JA). McLachlin J made it clear in *R v. Seaboyer* 66 CC (3d) 321, where she writes, “The jurors must be cautioned that they should not draw impermissible inferences from evidence of previous sexual activity. While such evidence may be tendered for a purpose logically probative of the defence to be presented, it may be important to remind jurors that they should not allow the allegations of past sexual activity to lead them to the view that the complainant is less worthy of belief or was more likely to have consented for that reason” (66 CCC (3d) 321, p. 409).

⁴¹ [1991] 2 SCR 577.

⁴² Elizabeth Sheehy, “Legalizing Justice for All Women: Canadian Women’s Struggle for Democratic Rape Law Reforms”, *Australian Feminist Law Journal* 6 (1996): 87, 89 (emphasis added).

women's group, the Government introduced Bill C-49, which further restricts the use of "mistaken belief in consent" defence, and hence limits the damage done against the complainants by the cross examination of "past sexual history".⁴³ The effect of the reform, unfortunately, is still not very obvious:

On the issue of women's past sexual history, I regret to report that although the new rules put in place by Bill C-49 have thus far survived constitutional challenge, they appear to have been relatively ineffective in containing the damage done by *Seaboyer*. Of course that should not be surprising, given that the Court itself in its decision in *Seaboyer* purported to repudiate the rape myths underlying sexual history evidence, but at the same time completely reinforced them by relying on some very pernicious rape myths about prostitutes and about girls who allege rape by their fathers.⁴⁴

This legal debate in Canada has sensitised the legal reformers to a dilemma: a simple rewrite of statutory provisions cannot solve all the problems and substantiate gender justice (in the context of sexual assault) without referring to a particular socio-cultural context where the law is executed. The problem must be examined within the mainstream socio-legal perspective, i.e., the (over-) domination of the sexuality discourse, as pointed out by Foucault. We are therefore facing a dilemma: on one hand, a total de-sexualisation of law would ignore, or even reinforce, the current imbalance of gender power politics; on the other, the effects of the legal reforms introduced are limited due to their (re)emphasis on current gender power politics where the existing patriarchal perspective of sexuality dominates. The dilemma intensifies when the socio-cultural particularity of Hong Kong is taken into consideration.

Restating Colonialism? — Localisation of Marital Rape Politics

The Foucauldian emphasis on the discursive production of truth(s) alerts us to the mechanism whereby a particular culture imposes its linguistic order on the world, and thus legitimatises (post)colonialism.⁴⁵ Engaging postcolonialism with gender studies, cultural differences and particularities, is therefore emphasised,

⁴³ The UK reform proposal 'Protecting the Public' also includes similar reform suggestions.

⁴⁴ Elizabeth Sheehy, "Legalizing Justice for All Women: Canadian Women's Struggle for Democratic Rape Law Reforms", pp. 87, 102.

⁴⁵ Robert Young, "Foucault on Race and Colonialism", *New Formation* 25 (1995): 57.

since any acultural (gender) essentialist generalisation can only lead to cultural imperialism. As Uma Narayan writes:

The gender essentialism perpetuated by relatively privileged subjects, including Western feminists, is understood to be a form of 'cultural imperialism', whereby privileged subjects tend to construct their 'cultural Others' in their own image, taking their particular locations and problems to be those of 'All Women'.⁴⁶

Hence, if we simply transplant overseas socio-legal analysis on (marital) rape, and the related legal amendment model without any localisation, could it reinstate a case of postcolonisation in Hong Kong? The local judiciary also recognises the importance of "cultural differences" with respect to sexual assault. In *R v. Kwong Kin-hung*, the court pointed out:

Cultural differences between different races of people produce very different reactions and modes of behaviour in conditions such as those which were alleged to have occurred in the present case.⁴⁷

Scholars have suggested that only if the law is contextualised within Han Chinese Confucian cultural values can it function effectively in Hong Kong.⁴⁸ Put simply, in order to develop a cultural specific socio-legal policy of controlling marital rape, we have to understand how "family" and "individual" are constructed in the indigenous socio-legal culture.

Besides Judeo-Christian moral ideology and liberal (legal)ism, Han Chinese conventions are another force shaping the socio-legal discourse in Hong Kong; "[i]t is of course difficult to make a very general statement about the historically extensive Han Chinese views, it will, however, be quite safe to say that the ideological roots of the Han Chinese views are found mainly in Confucian thinking".⁴⁹ Confucian thinking is a significant force formatting the legal/cultural/

⁴⁶ Uma Narayan, "Essence of Culture and a Sense of History: A Feminist Critique of Cultural Essentialism", in *Decentering the Centre: Philosophy for a Multicultural, Postcolonial and Feminist World*, ed. Uma Narayan and Sandra Harding (Bloomington: Indiana University Press, 2000).

⁴⁷ [1995] 1 HKLR 330, 333.

⁴⁸ Sin Wai Man and Chu Yiu Wai, "Whose Rule of Law? Rethinking (Post-)Colonial Legal Culture in Hong Kong", *Journal of Socio and Legal Studies* 7, no. 2 (1998): 147.

⁴⁹ Chiu Man Chung, "Contextualizing the Same-Sex Erotic Relationship — Postcolonial Tongzhi Political Discourse on Marriage Law of Hong Kong and Mainland China", in *Legal Recognition of Same-Sex Partnership*, ed. Robert Wintemute Andersen (Oxford: Hart Publishing, 2001).

familial discourse in Hong Kong.⁵⁰ Many scholars and activists claim that traditional Confucianism leads to the continued existence of domestic abuse cases in Hong Kong:

... the inferior status traditionally ascribed to women often places them in a vulnerable position both in the family and in society. It is as if aggression towards women is sacrificed in order to preserve harmony for the whole. This is especially so within the family context in which the wife tolerates the husband's bullying and violence so as to maintain family 'stability'.⁵¹

When examining marital rape law, we are therefore facing a dilemma: can we develop a legal reform strategy based on Anglo-American perspectives of gender/sexuality/power politics and rape law (reform) while accommodating the indigenous cultural values, i.e., Confucian socio-legal philosophy which itself is "essentially" misogynist? The dilemma worsens as Confucianism usually opposes the use of law in the domestic context. In fact, Confucian culture prefers an ideal society which is free of litigation and internal conflicts. Interpersonal harmony is of high importance:

In hearing lawsuits, I am no better than anyone else. What we need is to have no lawsuits.⁵²

The discussion produced by the proposal to amend the competence and compellability of a spouse in criminal proceedings is a good example showing the significance of harmonious familial relationships in a legal context, especially if "family/marital violence" is involved. In 1990, the Colonial Government in Hong Kong introduced a Bill to Amend the Criminal Procedure Ordinance, aimed at compelling a spouse to testify against another in the case of family violence.⁵³ Several members of the Legislative Council voted against it as they said it could destabilise the family unity traditionally treasured by the Han Chinese:

⁵⁰ Lau Siu Kai and Kuan Hsin Chi, *The Ethos of the Hong Kong Chinese* (Hong Kong: Chinese University of Hong Kong Press, 1988).

⁵¹ Catherine Tang, Antoinett Lee and Fanny Cheung, "Violence Against Women in Hong Kong", in *Breaking the Silence: Violence Against Women in Asia*, ed. Fanny Cheung et al. (Hong Kong: Equal Opportunities Commission, 1999), p. 39.

⁵² Translation from Chapter 12, *The Analects of Confucius* (Online) <<http://www.human.toyogayuen-u.ac.jp/~acmuller/contao/analects.htm>> [27 Aug. 1999].

⁵³ Cap 221, LHK.

Those who opposed the Bill were concerned that there would be adverse effects on the social fabric of Hong Kong, a primarily Chinese society with traditionally closely knit family units.⁵⁴

The Bill was finally defeated on 4 April 1990. Would cancellation of the exemption enacted on 4 July 2002 become useless in a locale in which the Confucian view of familial harmony is so highly respected? Or, does it mean that we have to desert Confucianism when proposing any legal reforms which substantiate and reproduce gender justice? It is here that the author argues that the “essential” reading of Confucianism neglects the multiplicities of Han Chinese culture and spaces of resistance within the philosophy.

It is correct to say that in Confucian teaching, which developed from the Zhou Dynasty (11th century BC), harmonious familial/personal relationships enjoy a very high status in Chinese legal discourse:

Throughout Chinese history, there were a lot of important [political] reforms, but blood relationships [i.e., familial relationships]⁵⁵ remain vital within traditional Chinese culture. Being an important element of the Chinese culture, they can resist the impacts of [political] reforms, and social changes.⁵⁶ (trans.)

Within the Confucian school of thought (in the Zhou Dynasty), an individual is not defined by her/his “isolated” personality, but by her/his position within a web of interpersonal relationships. Thus, the basic principle of “good being” — *jen* — is considered as the most important principle of Confucianism. When asked what *jen* means, he said: “love others”.⁵⁷ Confucius also made it clear that *jen* can only be substantiated through “filial piety” in the context of family.

⁵⁴ Legal Policy Division, Department of Justice, *Competence and Compellability of Spouse in Criminal Proceedings — Consultation Paper 5* (2000).

⁵⁵ The relationship between familial relationships and blood relationships is a very complicated one — although it is commonly stated that blood relationships form the basis of the familial relationships, there are exceptions — the relationship between husband and wife/concubine, and the relationship between parents-in-law and sons/daughters-in-law. However, though there are exceptions, we cannot deny that blood relations still form the centre of familial relationships which in turn are the basis of all personal relationships.

⁵⁶ Hao Tie Chuan, *Research of Chinese Legal System* (Shanghai: Fudan University Press, 1997), p. 242.

⁵⁷ Translation from Chapter 12, *The Analects of Confucius* (Online) <<http://www.human.toyogayuen-u.ac.jp/~acmuller/contao/analects.htm>>[27 Aug. 1999].

Are filial piety and brotherly love not the roots of benevolence?⁵⁸ Family is so important that Confucians develop a set of rules called *li* to guarantee its smooth operation. It refers to “rules governing religious, social, diplomatic and military ceremonies, rituals and rites (e.g., funeral rituals, wedding ceremonies), as well as rules and norms regarding proper behaviour, etiquette, manners, clothing, etc., for persons in different social classes or standings in particular familial or social relationships towards other persons”.⁵⁹ The foundation of *li* is the famous Three Cardinal Guides (emperor guides ministers, father guides sons and husband guides wife) and Five Constant Virtues (benevolence between father and son, righteousness between Emperor and ministers, differences between husband and wife, hierarchy between the elderly and young and fidelity between friends).

In the context of harmonious interpersonal relationships and *li*, individuals can be recognised only by their position in the hierarchical web. So, “she” can be identified only as “mother”, “wife”, “sister-in-law”, “daughter-in-law” or “daughter”, not an individual “woman”. “He” can be a “father”, “husband”, “brother-in-law”, “son-in-law”, “son” and “minister”, but never an independent “man”. Positions in the personal relationship web carry different duties and rights, and are strictly hierarchical and never equal. For instance, there was a famous axiom: “If the Emperor orders his minister to commit suicide, the latter could not resist.” By the same token and based on the principles of *li*, husband and wife never share the same rights or duties: husband can have more than one domestic sex partner (for example, concubines and female servants), but a wife must be sexually loyal towards her husband. A husband can proactively divorce his wife and concubine(s), but a wife does not enjoy such right. In short, in Confucian *li*, the notions of “individuality” and “equality” are simply marginalised. Confucius thus constructed a highly-hierarchical society.

As individualism was not emphasised (yet not pathologised) in the Confucian context, the foundation of marriage was not a romantic love which was strongly related to personal choice and preference. Rather, marriage was simply a familial and social function aimed at reproducing *male* offspring who would carry the family name. Females were to drop their family names and take up the family

⁵⁸ Translation from Chapter 1, *The Analects of Confucius* (Online) <<http://www.confucius.org/lunyu/ed0102.htm>> [23 Dec. 2002].

⁵⁹ Albert Chan, “Confucian Legal Culture and Its Modern Fate”, in *The New Legal Order in Hong Kong*, ed. Raymonds Wacks (Hong Kong: Hong Kong University Press, 1999), pp. 505, 522.

name of the husband's clans after marriage.⁶⁰ Reproduction played a vital role in a society which was built upon familial relationship networks. Without a male offspring, a family immediately becomes extinct, and a family name/title would also cease to exist. Also, it was a way through which the offspring could show respect to their ancestors. As Jiang Xiaoyuan writes:

It [reproduction of offspring] had nothing to do with any problems which contemporary people could think of, like succession ... it was in fact a familial sacred obligation — every man had the duty to continue the family name, to reproduce as many sons as he could ... if there was no offspring, no one would worship the ancestors.⁶¹ (trans.)

Under this situation, marital sex became a familial duty which a heterosexual married couple had to fulfil. If a wife failed to give birth to a son, she could be divorced lawfully.⁶² Hence, marital rape was not a problem at all, as reproduction through marital intercourse was a responsibility which (a husband and) a wife had to take up. Whether she consented to intercourse or not was never considered. Consent to marriage and marital sex were never problematised. A scholar even said: it was not uncommon that members of the husband's family physically abetted marital rape.⁶³

Can the legal system in a Confucianist society help raped wives and punish husband rapists? As already pointed out, Confucius opposed the use of law that would destroy interpersonal relationships. *Li* and interpersonal/familial relationships play a significant role in the Chinese traditional legal system. In fact, traditional Confucians titled law (*fā*) as “ethical law” which meant that familial ethics were the only focus of *fā*. In other words, the enactment and interpretation of *fā* must be grounded upon morality and *li*.⁶⁴ In Han Chinese Confucian culture, there were certain limitations to the usage of *fā*. It could only be used (1) when *li* failed to cope with the situation; (2) as a tool to penalise

⁶⁰ Chū Tung Tsu, *Chū Tung Tsu's Reader* (Beijing: PRC University of Political-Legal Studies, 1997), p. 109.

⁶¹ Jiang Xiaoyuan (trans.), *Chinese under Sexual Tension* (Shanghai: Shanghai People's Press, 1995), p. 146.

⁶² According to the traditional Seven Ouster Rules, if a woman is talkative, promiscuous, jealous, steals at home, does not adhere to filial piety for the parents-in-law, becomes seriously ill, or does not give birth to a son, her husband could divorce her.

⁶³ Yi Zhongtian (trans.), *Men and Women in China* (Beijing: Zhongguo wenlian, 1998), pp. 156–7.

⁶⁴ Sin and Chu, “Whose Rule of Law?”, p. 147.

those who acted against morality (namely, *li*); and (3) when the personal relationship totally collapsed.⁶⁵ The making and interpretation of *fa* must be grounded upon *li*.⁶⁶

We can say that the judges [in ancient China] were very loyal to moral values. Fundamentally, the laws they executed were controlled by the moral rules; in other words, no matter how strict or relaxed the law has been interpreted, the interpretation itself would in turn be restrained by morality.⁶⁷ (trans.)

This ideology can be illustrated by a Chinese proverb which says “*fa* is no other than human feelings”. Therefore *fa* was merely another construction of the Confucian concept of “harmonious interpersonal relationships”. *Fa* in such a hierarchical society, thus reconstructed and represented the underlying male dominating social structure, where subjectivity of individual woman was not even recognised and identified, and would not treat women fairly. For instance, under Tang Dynasty Law, if a husband assaulted his wife, he would receive a lesser degree of punishment than if a stranger assaulted her. However, if a wife assaulted her husband, her punishment would be double the normal punishment. Moreover, if the law found the husband guilty, the wife could not divorce or desert him. Even if the husband did something evil, his wife could not leave him.⁶⁸

If that was the case, why would a wife sue her husband? The duty to have sex with her husband was considered natural and compulsory and wives did not have the right to leave their husbands. The most significant problem is the lifelong burden of guilt resulting from demolishing a harmonious familial network. Would the cost be too high for the wives/victims of sexual offence and domestic violence to bear?

It seems that Confucianism essentially discriminates against women. However, as Foucauldians always say, “wherever there is power, there is resistance”, and location(s) of resistance always exist in the Confucian domination. As “harmonious interpersonal relationships” were highly

⁶⁵ Chou Wah Shan and Chiu Man Chung, “A Critical Study of Law of Marital Rape in PRC — Restructuring the Postcolonialism and Feminism in the Context of Law”, *Jurispudence Frontier* 3 (1999): 62.

⁶⁶ Sin and Chu, “Whose Rule of Law?”, p. 147.

⁶⁷ Liang Zhi Ping (trans.), *Searching the Harmony within the Rule of Nature — the Research of Chinese Traditional Legal Culture* (Beijing: PRC University of Political-Legal Studies, 1997), p. 288.

⁶⁸ Bai Gu (trans.), *Po Hu Tong* (Westport: Hyperion Press, 1988).

treasured by Confucius, extreme suppression of women or domestic violence would not be encouraged or condoned. Marriage signifies a unification of two families, i.e., a “wife” was not only an individual, but also a representative from another family. Hence, if a husband maltreated his wife, it would definitely damage the harmonious relationship between the two families. Also, since the wife was responsible for the reproduction of male heirs, she also had an important role in the ancestor worship. Her status was thus respected.⁶⁹

Taoism is another philosophy which deeply affects Han Chinese culture and Confucianism. It advocates the interaction between Yin and Yang, the dual cosmic forces that perpetuate the universe in an unending chain of permutations. Yin and Yang are the representations of female and male. Although it is a hierarchical structure in which Yang enjoys a higher position, it is not a simple either/or dichotomy. In fact, Yin and Yang complement or oppose each other at the same time. Excessiveness or deficiency in either Yin or Yang would result in a damaging and unhealthy situation:

Taoist practices are founded on two cosmological conceptions common to the whole of China: The *Tao* (Way), the unique principle that regulates the complementary forces; these are *Yin* (female principle, shadow, moon, etc.) and *Yang* (male principle, light, sun, etc.). Everything in nature participates in this dualism. The destiny of every creature is determined by it: day is followed by night, light has its shadow, life leads to death, and so on.⁷⁰ (emphasis original)

In other words, Han Chinese culture (including Confucianism and Taoism) moderateness (*zhong yong*) desires and praises moderateness. It also finds an absolute imbalance of power and male abuse of authority in marriage unacceptable.⁷¹

According to the Five Constant Virtues, it is the duty of the wife to be obedient towards her husband, though the couple is supposed to be co-operative

⁶⁹ Chü, *Chü Tung Tsu's Reader*, p. 113.

⁷⁰ Michel Beurdeley, Kristofer Schipper, Chang Fu Jui and Jacques Pimpaneau, *Chinese Erotic Art* (Hong Kong: Chartwell, 1969), p. 7.

⁷¹ For instance, even though a man could have more than one sex partner domestically, he could marry only one principal wife. If an emperor had more than one queen, he would be criticised as an incompetent ruler. Whenever there are two queens, the politics of the nation become chaotic and the source of turmoil (see *Chun qiu zuo shi huan shibanian zhuan*) (trans.).

and live harmoniously. Confucianism encourages a wife to provide her husband with constructive advice and suggestions, and it is also seemly for the husband to listen sincerely to these.

Contemporary marriage ... a couple should live respectfully with each other ... when the husband does something malicious, the wife should provide guidance patiently.⁷²

In short, a husband is encouraged to construct a “moderate” domestic/marital relationship and maintain a harmonious family life. Men do not actually enjoy absolute power under Confucianism in that wives can also claim some power and status: from the time a bride enters the home of the husband, she is ritually marked as “his mother’s successor”, i.e., her husband’s caretaker. Susan Mann hence concludes:

Although it is true that a young bride’s sphere of activity remained confined to the ‘inner’ domestic realm after her marriage, certain ritual texts nevertheless emphasise the power she acquired ... in her new sphere.⁷³

With this in mind, it is therefore reasonable and logical to say that Confucianism (in principle) does not accept any kind of serious domestic violence and wife abuse. This is not to say that Confucianism is not patriarchal. Women are respected, but only if they act according to the moral code of patriarchal Confucianism. There are spaces for them to voice and articulate their concerns, but only for the purpose of assisting their husbands. Thus, the underlying philosophy of traditional Confucianism, developed since the Zhou Dynasty, is still male domination. A woman’s individual subjectivity, desire and consent are neglected, and her subjectivity therefore absent. However, in the Confucian world where harmonious relationships are highly praised, total degradation and dehumanisation of women are not allowed. On the contrary, husbands must appreciate and accommodate the constructive thoughts and worthy opinions of their wives.

⁷² Song Ruoshen and Song Ruozhao, “Analects for Women”, in *Zhongguo meng xue jing xuan* (Collection of Chinese-Mongolian Studies), ed. Fang Fei (Nanling: Guangxi, 1995).

⁷³ Susan Mann, “Grooming a Daughter for Marriage: Brides and Wives in the Mid-Qing Period”, in *Chinese Femininities/Chinese Masculinities: A Reader*, ed. Susan Brownell and Jeffrey Wasserstrom (London: University of California Press, 2002), p. 97.

In Confucianism, there is no male totalist domination. Thus, a cultural specific resistance strategy can be devised.⁷⁴ In short, the Confucianist school and the ideology of harmonious interpersonal relationships does not object to any enactment of marital rape. However, simply reducing Confucianism to “a misogynist philosophy” misses the complexity of the Han Chinese Culture:

Dehumanisation of women and disregard of her right to body and life would not be accepted in ancient China, as it runs against the philosophy of Yin/Yang, *jen*, *li* and moderateness.⁷⁵ (trans.)

Another argument would be the unwillingness to use law as a method of resolution. It is stressed that if the familial relationship (including marital relationships) has been destroyed, Confucians would not hesitate to use *fa* as the last resort in settling familial disputes. *Fa* does not have the most significant role in Confucianism, but Confucians have not neglected its power and function:

Although Confucianism advocates the usage of the rule of ethics and the rule of people in education of *li*, if education by legal sanction would not harm the spirit and existence of *li*, and the target (of *li* education) could also be achieved, *Confucianism would never marginalise fa and legal sanction...*⁷⁶

Mencius also pointed out that one could not rule a nation well by relying only on either *li* or *fa*.⁷⁷ In the case of wife abuse, the husband would not have to bear any legal liability, but if the victim was murdered by the husband, then he would be sentenced to death.⁷⁸ In other words, although *fa* does not take up the most significant role in Confucianism (in the Zhou Dynasty), the

⁷⁴ A number of academics may claim that Traditional China/Han Chinese culture/Confucianism share the identical male-dominating social structure with the rest of the world. However, in the postmodern perspective, which emphasises the importance of differences and dialogue, the particularities of Han Chinese socio-cultural development have to be emphasised, otherwise, postcolonialism and Orientalism would be reconstructed and reconstituted. See Rey Chow, *Passions: Visuality, Sexuality and Ethnography in Contemporary Chinese Cinema* (New York: Columbia University Press, 1995).

⁷⁵ Li Shun (trans.), *Sex and Law* (Henan: Xinhua, 1993), p. 71.

⁷⁶ Song and Song, “Analects for Women”, p. 362.

⁷⁷ Yu Ronggen (trans.), *System of Tao and System of Law* (Beijing: Falu, 1999), pp. 200, 205.

⁷⁸ Chü Tung Tsu, *Chinese Law and Chinese Society* (Taipei: Li ren, 1994), pp. 136–7.

power and function of *fa* should never be ignored in the discourse of marital rape.⁷⁹

Engaging the Confucian perspective on harmonious familial relationships and *li/fa* with marital rape, the author would argue that besides considering the legal reforms to rape law introduced overseas (for example England, Canada and Australia), Hong Kong lawmakers should also consider court-mandated counselling, by which the husband-rapists would be subject to re-education or counselling. This could be well received as an alternative legal remedy (other than imprisonment) in a Han Chinese society, such as Hong Kong. With the effect of Confucianism on legal development, it is not surprising that court-mandated counselling has been legally launched on the Mainland and Taiwan. However, the mechanism is used only in dealing with domestic violence where serious physical harm or rape is not reported. So, whether or not the mechanism of court-mandated counselling could be adopted in the case of marital rape requires further in-depth investigation and research.⁸⁰

Conclusion

There is no attempt here to argue that “Indigenous Hong Kong Culture = (traditional) Han Chinese culture = Confucianism + Taoism”, since every cultural concept (including indigenous culture) is a product of multiple discursive interpretation without a fixed and monolithic definition.⁸¹ What the author puts forward is that the colonial perspective on gender legal politics is not a universal

⁷⁹ *Ibid.*, p. 362.

⁸⁰ The mechanism and possibility of engaging it within the legal system and Han Chinese culture have been discussed in detail in these two articles: (1) Chiu Man Chung, “Politicizing Han Chinese Masculinities: A Plea for Court Mandated Counselling for Wife Abusers in Hong Kong”, *Feminist Legal Studies* 9 (2001): 1–25; and (2) Chiu Man Chung, “Law-ing Harmonic Familial Relationship: Development of an Indigenous Feminist Legal Discourse on Child (domestic) Violence Law”, *Buffalo Women’s Law Journal* 8 (2000): 25–53.

⁸¹ Confucianism is not a monolithic and static concept, but is discursive, diversive, and its perspective on personal (gender) politics is always developing and changing. For example, during the Zhou Dynasty, female chastity was not emphasised, and widows were allowed to remarry. However, during the Sung Dynasty, female chastity was reconstructed as loyalty of wife towards the (deceased/present/future) husband. Thus, not only could widows not remarry, a wife might have to die to show her respect for chastity even if she was touched unintentionally by a male stranger.

standpoint of analysis. As Arif Dirlik writes, (re)presentation of local socio-historical culture is an effective and efficient mode of resistance against postcolonial legal-cultural hegemony:

From the perspective of Global Capitalism, the local is a site not of liberation but manipulation; stated differently, it is a site the inhabitants of which must be liberated from themselves (stripped of their identity) to be homogenised into the global culture of capital (their identities reconstructed accordingly).⁸²

The reinstatement of Han Chinese culture on sexuality/familial relationships problematises the belief that Hong Kong Han Chinese culture cannot accommodate the Anglo-American legal reform of sexual offences. However, whether such accommodation invites re-postcolonialisation is something that ought to be further investigated. Although Anglo-American legal-political perspectives on sexual assault would help explore the multiple spaces of resistance within the male dominating Han Chinese Confucian culture, the latter may not be able to concur with the philosophy of liberal individual sexual autonomy which underlies Anglo-American analysis. When localising the foreign theory or model of legal reform, the following questions should be examined critically: In the absence of marital rape exemption, how would married couples maintain harmonious relationships (if any)? How would a positive definition of “consent” influence the sexual power matrix between couples? How could the wife-victim handle the pressure (caused by victimisation) imposed by other familial members after she reported the case to the police? If the husband fails to gain (explicit) consent for sexual intercourse from the wife when they are still harmoniously living together, would that lead to any legal implications after their emotional relationship has deteriorated? How would the law handle the case in which the husband was the main income earner of the family, but was jailed for marital rape? Is the law willing to assist the child(ren) involved in marital rape cases? If yes, how? If, in the middle of the criminal proceedings, the wife and husband reconcile and the broken relationship is repaired, should the trial continue, even though it may once again destroy the harmonious relationship?

The above questions highlight the necessary yet complicated mechanism of legal engenderisation and localisation in the debate over rape law. Marital rape is not solely a legal issue of sexual assault, but a political intermingling of marriage,

⁸² Arif Dirlik, *The Postcolonial Aura: Third World Criticism in the Age of Global Capitalism* (Boulder: Westview, 1997), p. 96.

family, multiple dynamics of Han Chinese culture, gender studies and law/enforcement. The main conclusions here are that any mere change in statutory stipulations would not overcome gender injustice and discrimination which inherently exist within the patriarchal heterosexist laws pertaining to sexual offences. Any substantial legal reform needs to be engaged with the interactive dynamics between gender politics and indigenous local culture. The author hopes that the arguments put forward in this article might lead to further critical reflection not only on the legal construction of sexual offences, but also the development of indigenous gender legal studies.