

Representation and Practice in “Privately Settling Illicit Sex Offenses,” with Attention to the “Third Realm” from the Late Imperial Period to the Present

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Abstract

Privately settling illicit sex offenses has long existed in a legal gray area. Operating under the model of two-party court litigation, the Qing crime of “privately settling illicit sex offenses” proceeded from the fundamental starting point of the state’s desire to uphold the public interest and made it the victim’s obligation to report the crime and file suit. However, in practice, cases involving illicit sex were sometimes handled through mediation by *xiangbao*, who would arrange for the offender to provide financial compensation to the victim, and then for either the victim or the *xiangbao* to petition the government to withdraw and close the case. The government would then order an investigation of the situation surrounding the case, thus revealing the tension between the different sets of logic that undergirded the handling of “trivial matters” and “weighty matters.” The establishment of a new judicial system in the modern period brought rape within the scope of the state’s prosecutorial system, meaning that now the state, and not the victim, was a party to the case. Though “privately settling illicit sex offenses” was no longer considered a crime, state authorities would also no longer accept related direct petitions to withdraw a case. To achieve the same effect, the victim now had to lie and claim a love relationship with the offender, but in so doing risk the danger of imprisonment for committing perjury and concealing a crime. The state prosecution system’s denial of the private settlement of illicit sex offenses represents a rigidification experienced under the “formalization” of the law. Moreover, cases that fall under the “complaint by the victim herself” system are susceptible to abuse by the powerful. How to foster a positive and effective “third realm” of interaction between societal mediation and state adjudication remains a problem that awaits further exploration.

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Keywords

private settlement – the third realm – rape – crime – public prosecution – complaint by the victim herself

Research from Contemporary Case Records of “Privately Settling Illicit Sex Offenses”

In 2001, in a village on the outskirts of Beijing, a young girl surnamed Wang was tricked and seduced by a fellow villager named Wu. Subsequently, Wang's father went to the village leader to settle the matter. The village leader then called together the perpetrator, the victim, and relevant witnesses to engage in mediation that resulted in the following mutual agreement: Wu would compensate the victim with 5,000 yuan; the matter would be considered resolved and both parties would agree to not raise the issue again. The agreement was stamped with the village committee's official seal.¹

In a similar case, in June 2002, a villager named Liu from Yitang township in Cangshan county attempted to rape a girl named Zhang from the same village. Zhang then filed a complaint with the local village committee and police station. In July 2002, after the village committee conducted several rounds of mediation, a relative of Liu's reached a mutual agreement with Zhang. Liu's relative would pay a total of 1,600 yuan (1,000 yuan was paid upfront) as compensation for damage to Zhang's reputation. If the authorities arrested Liu before the case was withdrawn, then the already paid portion of the compensation would be returned to the Liu family. Remaining unsettled matters would await the withdrawal of the case before further negotiations would be undertaken. The village committee also provided to relevant government organs an officially stamped report of the mediation process that also included a copy of the mutual agreement with the signature of the mediator. In January 2003, public security authorities arrested villager Liu and subsequently the court sentenced him to a prison term of two and a half years for the crime of attempted rape.²

1 “强奸案能私了吗?” (Can a rape case be settled privately?) <http://news.eastday.com/epublish/gb/paper148/20010610/class014800019/hwz408150.htm> (accessed on Oct. 23, 2013).

2 “强奸案竟敢私了—村委会干部法制观念淡薄” (Rape case settled privately by mutual consent—village committee cadre's weak grasp of the law), www.dzwww.com/nongcundazhong/nongcunyiban/200306270732.htm (accessed on Oct. 23, 2013).

Cases that are subject to state prosecution of criminal acts but end up being privately settled (*siliao* 私了) are a common phenomenon in vast regions of the countryside.³ The *Procuratorial Daily* 检察日报 has previously pointed out that rape and hooliganism comprise one of the two categories of cases that are most frequently settled privately in the countryside.⁴ To be sure, these cases involve, to a certain extent, the issue of one's reputation and the unwillingness of the litigants involved to publicize the matter. However, in the two aforementioned instances of the private settlement of rape cases, what is striking is the actions of the village committee and village leaders. As a unit of local self-administration, even though the village committee is not formally included in the state's bureaucratic apparatus, in reality it plays a significant role in the practical administration of the countryside. These semi-state organs thus function as an important bridge of communication between the state and local society. The way these organs handle disputes, then, can be seen as the product of the interactions and clashes of a dispute resolution mechanism between society and the state. In short, this could be seen as a contemporary "third realm."

The "third realm" of dispute resolution was first conceptualized by Philip Huang and refers to an intermediate sphere between the state and society. It is within this sphere that informal societal regulations for handling dispute resolution and the state's formal justice system meet and interact. In his research on Qing legal practice, Huang points out that third realm justice typically unfolded in the following fashion. The plaintiff, after lodging a petition and before a formal court session took place, reached an agreement through mediation with the defendant, and then petitioned the government to close the case. From the beginning of the mediation process to the final withdrawal from court, *xiangbao* and other local-level quasi-officials played an important role.⁵ In his discussion of the "third realm," Huang's focus is on the simultaneous engagement of local mediation and formal justice and the interaction between the two in settling civil disputes. This analytical framework, though, can also be applied to criminal cases. In the aforementioned cases, the process by which litigants privately settled cases of illicit sex and the involvement

3 Liu Tao 刘涛, "私了, 法律被悬空的忧患" (Privately settled: Concerns over the failure to implement the law), 西部法制报 (Western Regional Law Journal), Oct. 30, 2008.

4 Dao Qu 道渠 and Zhao Li 兆利, "两类案件容易私了" (Two types of cases that are frequently settled privately), 检察日报 (Procuratorial Daily), Mar. 18, 2002.

5 Huang Zongzhi 黄宗智 [Philip C. C. Huang], 清代的法律、社会与文化: 民法的表达与实践 (Civil justice in China: Representation and practice in the Qing) (Shanghai: Shanghai shudian chubanshe, 2007), 91–111.

of village committee members is remarkably similar to the logic of the “third realm.” However, because privately settling illicit sex offenses falls within the scope of criminal law and directly conflicts with specific legal statutes, the operation of the “third realm” in these instances is more complex and is characterized by greater conflict. Thus, in dealing with mediation by local village committees in rape cases, in addition to the media’s perspective that mediation “lacks legal consciousness and has a weak grasp of the law” (*fali yishi cha, fazhi guannian danbo* 法律意识差, 法制观念淡薄), we also need to employ a deeper socio-historical analysis. First, we should take a long-term perspective and begin with the representation and practice of late imperial Chinese law to examine the inner logic of “privately settling illicit sex offenses” (*sihe jianshi* 私和奸事).

“Privately Settling Illicit Sex Offenses” in the Qing Code

The Qing Code treated “privately settling illicit sex offenses” as a specific crime listed in a special clause within the category of “privately settling state matters” (*sihe gongshi* 私和公事). Shen Zhiqi’s commentary on the Qing Code explains “state matters” as “having come under the view of the state” (*fajue zaiguan* 发觉在官), which means that a matter that has already come within the purview of the government could not be privately settled by litigants. Those caught privately settling a state matter would receive punishments that were two degrees lighter than the prescribed punishment for the crime involved, but with a maximum penalty of 50 blows of the light bamboo.⁶ Private settlement in cases involving homicide and rape fell outside the scope of the punishment limitation of “50 blows of the light bamboo.” In accordance with the statutes on homicide and rape, commoners engaging in private settlement in homicide cases would be punished with 60 blows of the heavy bamboo, and those engaging in private settlement of rape cases would receive penalties reduced by two degrees with no stipulations regarding limits on the numbers of blows.⁷ In addition, Shen’s commentary and extant cases reveal that private settlement in homicide and rape cases was not subject to the “state matters” limitation that the case already be under the purview of the state. This meant that in addition to prohibiting litigants from privately settling a case already filed with the government, the state also required the victim to report cases to the

6 Shen Zhiqi 沈之奇, 大清律辑注, 下 (Commentary on the Great Qing Code, vol. 2), punctuated by Huai Xiaofeng 怀效锋 and Li Jun 李俊 (Beijing: Falü chubanshe, 2000), 942.

7 Ibid., 912.

government even when the latter had no knowledge or awareness of the matter. In the Qing Code, illicit sex included three circumstances: consenting to illicit sex (*hejian* 和奸), tricking or being tricked into illicit sex (*diaojian* 刁奸), and forcibly raping a woman (*qiangjian* 强奸). As for punishment for the private settlement of such illicit sex cases, we can calculate that the lightest would be 60 blows of the heavy bamboo, while the heaviest would extend to life exile, which was even more severe than the punishment for private settlement of a homicide case.

Shen's commentary explains the legal statute this way: "Private settlement of state matters is the least severe of all crimes involving private settlement. Because homicide involves life and death and illicit sex involves the maintenance of good societal morals, private settlement of homicide and illicit sex cases are offenses that are given special treatment and do not fall within the general category of private settlement of state matters."⁸ "Homicides and private settlement of state matters are crimes that involve a single person and a single issue. However, illicit sex involves the maintenance of good societal morals, and thus is a serious crime."⁹ From this, we can see that maintaining good societal morals represented the law's primary rationale for prohibiting privately settling illicit sexual offenses.

Chinese legal historians have long held the notion of "the law is all-encompassing without distinguishing civil and criminal matters" (诸法合体, 民刑不分) as one of the key characteristics of traditional Chinese law. However, in recent years, this idea has come under increasing scrutiny.¹⁰ The existence of the crime of privately settling illicit sex offenses shows clearly that the state's laws on illicit sexual affairs (including adultery and rape) were concerned with violations of the maintenance of good societal morals, and not just the harm done to the woman herself or her husband. This is why the state felt the need to place these cases under the category of "weighty cases" (重案) and to prohibit the husband or victim from engaging in mediation with the perpetrator. By doing so, the state thus distinguished illicit sexual affairs from "minor matters" (细事) in which mediation was allowed, such as disputes over land, debts, and marriage and family issues.

8 Ibid., 943. 私和公事最轻, 惟人命关乎生死, 奸情关乎风化, 各有本条, 不在公事之内.

9 Ibid., 915. 彼人命、公事, 所系者一人一事之罪, 此之所和者, 关乎风化, 故特重之.

10 Yang Yifan 杨一凡, "中华法系研究中的一个重大误区—'诸法合体、民刑不分' 说质疑" (A grave error in research on the Chinese legal system—questioning the notion of "The law is all encompassing without distinguishing civil and criminal matters"), 中国社会科学 (Chinese Social Science) no. 6, 2002: 78–94.

The crime of “privately settling illicit sex offenses,” from one perspective, reveals how the law in late imperial China substantively did distinguish between weighty cases that involved “life and death and the maintenance of good societal morals” and disputes over minor matters at the local level. However, from another perspective, the recognition of these essential differences had no effect on how cases were tried in court. As a matter of formality, regardless of the type of suit, both perpetrator and victim were treated simply as the two litigating parties.¹¹ Under this circumstance, the law could only, under threat of punishment, obligate the victim to report the crime in order to ensure the perpetrator’s punishment by the state.

In addition, we can also see that the law criminalizing “privately settling illicit sex offenses” was specifically aimed at two groups: the parties directly involved in the case and the intermediaries. That the parties themselves were a focus is obvious and requires no further elaboration. Intermediaries played a crucial role in dispute resolution in Qing local society. Just about every mediation agreement was handled under the guidance of respected clan elders and neighbors. Therefore, the Great Qing Code’s stipulation that “Anyone who oversees a private settlement in an illicit sex offense after a case has already come under the purview of the state will receive penalties reduced by two degrees”¹² was aimed at meting out heavy punishment to intermediaries who sponsored a private settlement of an illicit sex crime. In seeking to preserve order and to shore up the state’s legal authority, the practical intent of the law was to deny the operation of a “third realm” by regulating two instances where village customary practices were intruding on state law: involved parties bringing suit and subsequently withdrawing it because of a privately mediated settlement and intermediaries sponsoring mediation and then withdrawal of a suit. It should be no surprise that the state’s legal expression here generated great tension with the reality of the “third realm.”

11 In this article, for the categories of “formal” and “substantive,” I have drawn on similar ideas discussed by Max Weber: “formal” emphasizes procedural logic; “substantive” emphasizes the consideration given to the specificities of each case. However, my usage of “formal” and “substantive” is not meant to imply a dichotomy between “rational” and “irrational.” See Max Weber, *Law and Society*, trans. Kang Le 康乐 and Jian Huimei 简惠美 (Nanning: Guangxi shifan daxue chubanshe, 2005), 216–29.

12 Shen Zhiqi, *Commentary on the Great Qing Code*, vol. 2, 912.

“Privately Settling Illicit Sex Offenses” in Qing Legal Practice

The social realities revealed in cases from the Qing era show it was common for litigants and intermediaries such as local *baojia* to engage in the private settlement of illicit sex offenses. The attitude of county officials toward this, however, is less clear. On the one hand, county officials needed to operate from the position of upholding the state's laws by punishing acts that endangered societal morals. On the other hand, they also recognized and countenanced, at least to a certain extent, customary local practices and regulations. This point of tension, then, undergirded the logic of practice for county government, which, upon receipt of a petition for withdrawal of a case, would order an investigation of the actual circumstances surrounding the matter.¹³

Based on the archival records, we can distinguish two patterns depending on when the alleged sex offense was reported to the government: private settlement reached before the state became aware of the matter and private settlement reached after the state had already been alerted to the matter. The latter is where we can see the “third realm” most actively in operation.

Private Settlement before the State Was Aware of the Matter

Under certain circumstances, before the state had become aware of a matter (*anfa qian* 案发前), both parties, through the aid of intermediaries, engaged in local mediation that resulted in a settlement. One such case comes from the

13 “The logic of practice” is a concept first developed by the French socio-anthropologist Pierre Bourdieu. Under Philip Huang's further development and usage, the concept is now used to highlight the distinctions between “practice” on the one hand and representation, theory, and institutions on the other. First, juxtaposed against theory, the concept of practice refers mainly to action. Second, the idea of practice is understood as juxtaposed against official representation and discourse. Finally, juxtaposed against institutions and structures, practice emphasizes actual operation and process. It is in carrying out the operation of the law that one sees the “logic of practice” of county officials. At the same time, the “logic of practice” is not merely the opposite of representation, theory, and institutions. More importantly, the logic of practice highlights the “history of practice as reflected through the interaction” of the three and the logic of proceeding from the empirical to the theoretical and then back to the empirical. See Pierre Bourdieu, *Outline of a Theory of Practice* (Cambridge: Cambridge University Press, 1977); Huang Zongzhi 黄宗智 [Philip C. C. Huang], 过去和现在: 中国民事法律实践的探索 (The past and the present: Chinese civil justice in practice) (Beijing: Falü chubanshe, 2009), 1–19; idem, “我们要做什么样的学术? 国内十年教学回顾” (What kind of scholarship should we engage in? Reflections on ten years of teaching in China), 开放时代 (Open Times) no. 1, 2012: 60–78.

Ba County Archives in Sichuan province. In the 49th year of the Qianlong emperor's reign (1784), a widow named Chen engaged in illicit sexual intercourse by mutual consent with a Xiao Dongsheng, who was then caught by a group of men organized and led by the widow's brother-in-law Lei Ren. Though originally intending to report the crime the next day, Lei Ren agreed to a settlement with the help of mediation by local neighbors. Afterward, however, the two parties became embroiled in another suit that then dragged the illicit sex offense back into the dispute. The county magistrate reprimanded Lei, saying, "Since you had already captured the person, you should have immediately brought him in for investigation. By acting partially and privately settling the matter, you have acted unlawfully and also have harmed order."¹⁴ The county magistrate upheld the state's position that illicit sex must be punished because of the harm done to good societal morals. The case also reveals that, unlike other cases of "privately settling state matters" that were subject to the limiting factor of "having [already] come under the view of the state," the scope of the prohibition of privately settling illicit sex offenses even encompassed instances where the state was not yet aware of the matter.

Private Settlement after the State Was Aware of the Matter

Under certain circumstances after a suit was already lodged with the government but before a final verdict was issued (*anfa hou* 案发后), litigants reached a settlement through mediation by *baojia* and other village residents. In that case, the victim or the *baojia* would submit to the county yamen a petition to close the suit. It is here that the "third realm" flourished—much to the dislike of county magistrates—and made something that was originally strictly forbidden by the law into a common phenomenon in legal practice. For example, in the 46th year of the reign of Qianlong (1781), Song Youzhang's wife, Feng, hanged herself and died after it came to light that she had had illicit sex with Zhou Shaoji. Song Youzhang's mother, Mrs. Yang, was willing to put an end to this matter and not bring it to court. Through mediation by local *baojia*, Mrs. Yang settled with the Feng family and agreed to give them a sum of money for the funeral. The *baojia* then petitioned the county government to close the case, which was met with the magistrate's rebuke: "How can a private settlement be tolerated when a case of illicit sex has resulted in a death? This is a

14 Sichuan Provincial Archives 四川省档案馆, ed. 清代巴县档案汇编 (乾隆卷) (Compilation of Qing dynasty Ba county archives [Qianlong files]) (Beijing: Dang'an chubanshe, 1991), 149.

very presumptuous and despicable act. The request for withdrawal of the case is denied.”¹⁵

However, even when seeking to punish illicit sex in accordance with the law, magistrates at times would also extend a degree of latitude toward local mediation of illicit sex cases. First, even though magistrates would sometimes reject petitions for the withdrawal of a case, they would also rarely, if ever, mete out punishment in accordance with the law on “privately settling illicit sex offenses.” Second, the likelihood that a petition to close a case would be granted was actually quite high.

In the Ba county section of a compilation of cases published by the Sichuan Provincial Archives, we find a case titled “Shi Dijian from Shizhongli” involving a Shi Runting who sexually propositioned the servant girl of Shi Dijian. Despite being reprimanded by Shi Dijian, Shi Runting subsequently went to Shi Dijian’s home and beat the girl, who then hanged herself. Fortunately, someone arrived in time to save the girl. Shi Dijian then lodged a suit against Shi Runting charging the latter with bullying someone to engage in illicit sexual intercourse and causing the victim to commit suicide. However, Shi Runting asked neighbors to convince Shi Dijian to withdraw the suit and the two parties eventually came to an agreement. According to the narrative summary of the case, the request to withdraw the case was granted by the county government.¹⁶

Similarly, in a case titled “Wang Jiadong’s lawsuit,” we learn about a Wang Jiadong whose wife, Mrs. Zeng, engaged in consensual illicit sex with their landlord, Wang Shijue, when her husband went into town to work. When Wang Jiadong discovered this, he lodged a suit and even submitted a special petition to request heavy punishment for Wang Shijue. However, ten days later, neighbors submitted to the magistrate a petition to withdraw the case stating that though the two parties had been in dispute, through mediation by relatives and neighbors, Wang Jiadong had agreed to move somewhere else and both parties had agreed to settle and close the case. The archival record does not contain any further comments or information, and thus the petition very possibly marked the end of the case.¹⁷

Though there is no way to be sure of what took place during those ten days to cause such a dramatic shift in the case, we can draw on a similar case to form some conjectures. In 1927, Shunyi county resident Liu Langui’s son Changjiangtou raped and killed Lu Lansheng’s seven-year-old daughter. Liu Langui assembled seventeen people to help with mediation, offered Lu Lansheng

15 Ibid., 88.

16 Ibid., 89.

17 Ibid., 152.

monetary compensation, and used a variety of methods to threaten and entice Lu, and finally got him to agree to settle. In the end, a petition was submitted claiming “the two parties, in accordance with the principles of propriety and amity, have agreed to withdraw the lawsuit.” The county government approved the request to close the suit.¹⁸ Even though this case dates from the Republican period, when China’s modern legal system was being established, nevertheless, not much had changed from the Qing in terms of the mechanisms for dispute resolution in local society. In essence, illicit sex matters were privately settled through local mediation (i.e., by the *baojia*), involved the perpetrator monetarily compensating the victim, and ended with either the victim or *baojia* petitioning the government to withdraw and close the case.

By examining Qing “privately settling illicit sex offenses” in terms of its representation and practice, one can discern two sets of legal rationales that were simultaneously followed in dispute resolution between state and society: community mediation and the official law of the state. Local societal rules relied on mediation to resolve so-called minor matters. Viewing illicit sex as “weighty cases” that involved morality and decency, state law demanded it be punished by the state. In terms of its representation, the boundary between “minor matters” and “weighty cases” was crystal clear. In practice, however, this was not necessarily the case. From the letter of the law, “minor matters” and “weighty cases” basically represented differences in degrees. Local residents often were not concerned about maintaining the good societal morals that the law so wanted to uphold in “weighty cases” and so chose to apply the logic of mediation, which was meant for settling “minor matters,” to resolve their disputes. In the realm of community mediation, monetary compensation was the means to secure the perpetrator’s release from further responsibility. This form of justice was considered to be neither unfair nor immoral. Within this logic then, the law became a “reserve” resource for the victim to use during mediation to extract greater financial compensation. Under these circumstances, the “third realm” frequently appeared and intruded on the boundaries the state set between official law and societal mediation.

In late imperial China, those who engaged in privately settling illicit sex offenses were in jeopardy of running afoul of the law. However, given the power and utility of the “third realm,” few were ever truly in jeopardy. County magistrates usually employed a different logic in seeking to relieve the tension between representation and practice. Thus, while all matters related to illicit sex in principle were to be reported to the government, nevertheless, magistrates to a certain degree did recognize and allow subsequent mediation and

18 Huang, “The Past and the Present,” 28–29.

settlement. In the end, whether a settlement agreement had the desired effect of ending a suit depended on the magistrate's "investigation of the concrete circumstances" of the case. During the investigation, the magistrate would reconsider the severity of the case based on factors such as the degree of harm caused, the seriousness of the consequences, and the damage caused to social order. If the magistrate concluded that an illicit sex case was not particularly severe, such as in the example of "Wang Jiadong's lawsuit," which was purely a matter of consensual illicit sex, or in the instance of an unsuccessful rape attempt that did not result in more severe consequences, then a mediated agreement would be tacitly recognized. However, in more serious situations, such as with the case of "Engaging in illicit sex by mutual consent between Feng and Zhao Shaoji," which resulted in a death, the magistrate would reject the request to withdraw the lawsuit and mete out punishment in accordance with the state's laws.

In other words, in representation Qing law relied on substantive concrete situations to draw out distinctions between illicit sex crimes deemed "weighty cases" versus those considered "minor matters." Investigations into the concrete circumstances surrounding a case helped magistrates to navigate the problem of how to translate the crime of "privately settling illicit sex offenses" into actual practice. This method accounted for the different circumstances of each case and helped to foster a balance between informal societal mediation practices and the official law of the state. Nevertheless, this system was susceptible to the problem of arbitrariness because magistrates ultimately had discretion in determining whether to carry out an investigation of the concrete facts of a case. According to most people's understanding, rape is more serious than consensual illicit sex. An accomplished offense is more serious than an attempt. A case that results in great harm is more serious than a case that results in little injury. Even so, the aforementioned 1927 case involving the rape and death of Lu Lansheng's young daughter turns upside down one's basic expectations of justice and common sense. As a prominent local figure of wealth and power, Liu Langui assembled seventeen of the most prestigious local mediators to exert great pressure on Lu Lansheng, leaving him with no alternative but to submit. In this instance, the county government did not call for an investigation, thus allowing the injuring party to take advantage of a legal loophole to escape punishment. From this case, then, one can see that a great degree of uncertainty surrounded the decision over which petitions for withdrawing a case were to be granted. This also allowed officials the opportunity to conspire with various parties to engage in corruption.

Of the two village-committee-mediated rape cases discussed at the beginning of this article, one was privately settled before the state had become aware

of the matter, and the other involved a “third realm” private settlement after the state had become aware of the matter. In both cases, one can see that the Qing legal logic for dealing with “privately settling illicit sex offenses” extends all the way to the present. Even so, along with changes in the modern legal system, the representation and practice of “privately settling illicit sex offenses” has also evolved, a point to which we now turn.

Changes in the Modern Conception of Illicit Sex Crimes

In modern times the former category of “illicit sex crimes” has undergone two major changes: from a substantive perspective, consensual illicit sex no longer falls within the scope of a “crime”; from a formal perspective, criminal cases and civil disputes are now handled through two different modes of litigation and treated as conceptually distinct categories.

A Substantive Split in “Privately Settling Illicit Sex Offenses”

Due to the influence of notions of free love and sexual liberation, “emotions” (*ganqing* 感情) have become the foundation for marriage and divorce. “Extramarital affairs” (*hunwai qing* 婚外情) and other types of illicit sex no longer fall within the regulatory scope of criminal law and only become a factor in divorce when such actions are viewed as faults and become a basis for the non-offending party to request an extra division of the marital assets. In divorce cases, mediation is mandatory. Thus, through the agreement of both parties, illicit sex matters can either be forgiven or settled through mediation, rendering any “third party” (*disanzhe* 第三者) irrelevant in the eyes of the law.

Only in instances when a member of the military is the injured party in a case of illicit sex by mutual consent can a request be made for the third party, who committed the illicit sex with the spouse, to be punished according to the law. However, only the offending third party will be punished under the category of damaging a soldier’s marriage; the spouse who engaged in illicit sex by mutual consent is not subject to punishment. The People’s Supreme Court’s 1963 promulgation of a “Report on the Court’s Opinion on Handling Cases of Damaging a Soldier’s Marriage” stated that, on the one hand, the third party in such cases should be severely punished, and on the other hand, that efforts should be made to “persuade the soldier’s spouse to correct his or her mistakes and for the couple to be reconciled.”¹⁹ Here we find a big difference between China and other countries that have maintained the category of engaging in

19 *Quan junren pei'ou gaizheng cuowu* 劝军人配偶改正错误.

illicit sex by mutual consent as a crime. South Korean law, for example, states that both offending parties should be punished, with divorce as the premise for initiating a lawsuit over engaging in illicit sex by mutual consent.²⁰ Moreover, in China, even though the crime of damaging a soldier's marriage is not explicitly identified by the criminal law as a matter of private prosecution (自诉案件), an examination of relevant case records reveals that in judicial practice, cases of damaging a soldier's marriage were usually handled as "a light criminal case initiated by a victim who has sufficient evidence."²¹ In these cases, the soldier initiates the suit without the involvement of any public security authorities; the soldier can also withdraw the suit after it has been lodged. In short, the previous category of "engaging in illicit sex by mutual consent" has now been completely moved to the private realm and can be privately settled.

Rape Cases and Public Prosecution

Operating within the context of two-party court litigation (两造对簿公堂), the crime of "privately settling illicit sex offenses" in imperial China proceeded from the fundamental starting point of the state's desire to maintain good societal morals and made it the victim's obligation to report the crime and file suit. The modern period brought several changes to this system of litigation. In 1906, during the late Qing reform movement, the Qing court, copying the West, established procurator offices at various levels, and thus for the first time in China implemented a system of state prosecution (公诉制度). Under the idea of state prosecution, a specialized government organ is given the legal mandate to prosecute cases in court on behalf of the state and the people, thus establishing a litigation model that has as its focus the relationship between the state prosecuting organ and the party being prosecuted. In cases involving crimes that damage the public interest, the state—via the state prosecutor—takes the role of the plaintiff on behalf of the people. Moreover, within the standard state prosecution model, the injured party is not a litigant in the criminal case, but rather only a witness for the plaintiff with very limited influence over the lawsuit itself. Only with the revision of China's Criminal Procedure Law in 1996 was the injured party in criminal cases recognized as a litigant and therefore given greater litigation rights. Nevertheless, the state

20 Wu Changzhi 吴昌值, "韩国刑法上的通奸罪考察" (An examination of consensual illicit sex in Korean criminal law), *中国刑事法杂志* (Chinese Criminal Law Journal) no. 6, 2003: 120.

21 *Beihai ren you zhengju zhengming de qingwei xingshi anjian* 被害人 有证据证明的轻微刑事案件。

enjoys a monopoly over state prosecution; the injured party has neither the right to initiate a prosecution nor the authority to withdraw a suit.

The state prosecution model is predicated on a state-society binary and draws a clear boundary line to demarcate the public from the private sphere. The state has a monopoly over matters that fall within the public sphere; individuals cannot interfere whatsoever in such situations. Conversely, individuals have authority over matters that fall within the private sphere; the state cannot interfere. To be sure, determining the nature (public or private) of an offense requires consideration of the specific situation. Nevertheless, after the determination has been made, the case follows a formal procedure.

Private Settlement of Rape Cases under the Public Prosecution System

Of all the activities previously punished by the state under the category of “illicit sex crimes” (奸罪), today only the crime of rape is included within the scope of public prosecution. This has resulted in two consequences for the private settlement of illicit sex offenses. First, “privately settling illicit sex offenses” itself is no longer considered a crime. Second, private settlements and petitions for withdrawing a suit in rape cases have absolutely no basis within the current legal framework. However, we can also see instances in contemporary China of rape cases being privately settled both before and after a complaint has been lodged with the state. Even though there are now far fewer “intermediaries” involved in private settlements after a complaint has been lodged with the state, nevertheless the “third realm” remains useful for analyzing the interaction between informal societal regulations and the state’s formal laws.

Private Settlement in the Absence of Prosecution

In March 2010, in a certain village in the Shandiling region of the Jianjiang Development Zone in Huazhou city, a middle school girl was lured into unlawful sexual intercourse with an old village man, who happened to be over 60 years old, and became pregnant. The matter was privately settled when the man agreed to pay 150,000 RMB and the girl’s father took her into town to get an abortion. Subsequently, when a reporter asked local police whether “Under the circumstances, should the authorities have stepped in and carried out an investigation?” the police responded by saying, “Private settlement would not be allowed if the girl had not yet reached 14 years of age. However, because the family did not want the matter to be exposed, it is doubtful that they would have reported the case to the police. Besides, the two sides had already reached

a compromise. If the family is unwilling to cooperate, then there is nothing that can be done.”²² The establishment of the state prosecutorial system eliminated the obligation of the injured party to report the case and instead made it the obligation of public security organs to prosecute the crime. Yet, in regard to unreported rape cases, even though the police have the authority and obligation to initiate investigations, in reality they do not necessarily become actively involved in such cases. Under these circumstances, the law also contains no regulations concerning private settlement by the two parties. Thus, the private settlement of unreported cases has become a “blind area” in China’s legal system.

Withdrawing a Complaint

Because the formalization of the procedure for handling rape cases under the state prosecution system essentially has eliminated the injured party from the litigation process, reconciliation and settlements reached by the two parties and a subsequent petition to “withdraw and close the case” are now also denied recognition by state authorities. A 2007 case involving the rape of Xiaofang by Ah Li is a typical example. After learning that Xiaofang had reported the rape, Ah Li offered many apologies and treated her to numerous meals and shopping trips. Gradually, Xiaofang accepted Ah Li and the two developed a romantic relationship that then led to a wedding engagement, much to the delight of the parents on both sides. Then, in January 2008, in the midst of friends and family rejoicing, public security officials arrested Ah Li as a rape suspect. When Xiaofang rushed to the public security office to petition that the complaint be withdrawn, the police told her that public prosecution cases could not be withdrawn. Hence, in July of that year, the court sentenced Ah Li to a three-year term of imprisonment suspended for four years.²³

Given that a direct petition to withdraw a case will be denied, parties who wish to have the case dismissed can only deny that rape had ever taken place and falsely claim that the relationship was a romantic one. For example, in Baoding in 2004, after Heling reported to authorities that she had been raped by an internet friend named Liao Zhenyu, the latter’s mother apologized to

22 “老人诱奸初一女孩致其怀孕，双方接受以钱私了” (Old man lures young middle school girl into illicit sex and gets her pregnant. Both sides agree to settle through monetary compensation), <http://news.sina.com.cn/s/2010-03-31/140919979890.shtml> (accessed on Oct. 23, 2013).

23 “女孩爱上了强奸自己的男子，向法院求情要求撤诉” (Girl falls in love with her rapist, requests the court to withdraw suit), http://news.fznews.com.cn/shehui/2008-7-23/20087231CmOBoHVyx95334_2.shtml (accessed on Oct. 23, 2013).

Heling's parents and requested the complaint be withdrawn. In return, Liao's mother offered to pay 200,000 RMB in compensation and have her son marry Heling. Persuaded by her parents, Heling went to the public security bureau to withdraw the complaint, claiming that she and Liao Zhenyu were lovers who had gotten into a dispute. She had filed the complaint merely to teach him a lesson about not acting so boorishly. A few days later, because no evidence could be found, the police released Liao Zhenyu and closed the rape case.²⁴

Once a complaint of rape has been filed, feigning a lover's dispute is just about the only way that parties who reach a settlement agreement can ever hope to secure approval to withdraw the complaint. However, using this tactic entails some risk. If public security officials or procurators are not convinced and the truth of the matter is subsequently revealed, then the injured party could be prosecuted for concealing a crime. In 2005, Nannan, who had not yet turned 18, was raped by Li Zhiguo. Afterward, Nannan reported the crime to the public security bureau, which then arrested Li Zhiguo. The procurator's office indicted Li on rape charges and filed an action with the district people's court. However, when called to testify at Li Zhiguo's trial, Nannan claimed that the sexual intercourse between them had been consensual. An investigation by the judiciary revealed that after Li Zhiguo was arrested on suspicion of rape, his father, Li Zhiyuan, had apologized to Nannan, gave her money and presents, and invited her to stay at their house. Moved by this display of "fatherly affection" (*cifu zhi xin* 慈父之心), Nannan brought up the idea of withdrawing the complaint, and then in her court testimony, offered a reversal of the original statement she had given to public security officials. In the end, Li Zhiguo was convicted of rape and sentenced to four years in prison. Li Zhiyuan was convicted of concealing a crime and sentenced to two years of state surveillance. Nannan was convicted of concealing a crime but was not sentenced to any criminal punishment.²⁵

A similar case occurred in December 2007 when a 17-year-old girl named Yang, after being raped by a person named Jiang, reported the crime to the police, which then led to Jiang's family members offering Yang 6,000 RMB in compensation. Accepting the agreement between the parties, Yang then petitioned the procurator and public security office to withdraw the case on the

24 “强奸案20万私了，贪财母亲姑息的是狼啊” (Rape case settled for 200,000 RMB, greedy mother appeases the wolves), www.chinaqking.com/sh/2007/9189_3.html (accessed on Oct. 23, 2013).

25 “一起强奸案引出‘私了’闹剧，受害人终成被告” (Rape case creates dramatic “private settlement” fiasco, injured party ends up being prosecuted), <http://news.sohu.com/20061101/n246127789.shtml> (accessed on Oct. 23, 2013).

basis that she and Jiang were actually lovers. Doubting the veracity of Yang's claims, the procurator had the public security office conduct an investigation that then revealed the truth. In the end, Yang was convicted of concealing a crime and sentenced to one month of criminal detention.²⁶

The following case, which occurred in the United States, but attracted much attention in China, forms an interesting contrast to the two preceding cases. In April 2012, Tang Peng, a 21-year-old student from China studying in Iowa, was arrested on suspicion of using the pretext of renting a room to rape the female landlord. Upon receiving the news, Tang Peng's parents immediately rushed to Iowa to find their son's accuser and offered the woman money in an attempt to convince her to change her statement. The woman reported this to the police, which resulted in the local prosecutor charging Tang with rape and his parents with attempting to bribe the victim.²⁷

Even though enticing a person to change his or her testimony is unequivocally considered criminal in both China and the United States, the reality in China is that the operation of the "third realm" has not only allowed people to privately settle and thus override and avoid the reach of the law, it has also made this a common and accepted phenomenon. While the contemporary Chinese legal system has undergone dramatic reforms, including a clear delineation of the substantive and formal conceptions of civil law and criminal law, nonetheless, in disputes between state and society, the two conceptions continue to exist in a state of contradiction. Because many in China's vast countryside operate on the assumption that "a crime merely represents a more serious type of dispute," few see problems with applying the practice of mediation beyond civil disputes to resolve a whole range of legal situations. This prevailing assumption also makes it hard for many to understand how the state can so relentlessly pursue a defendant even when the injured party has clearly expressed the wish that there be no investigation. In China, where there is a lower penetration of state authority at the local level, informal societal dispute resolution mechanisms can easily cross boundaries and find wider adoption. Also, in their interaction with different societal and state dispute resolution

26 "17岁女孩被强奸后为6000元撤诉,被判拘役一个月" (17-year-old rape victim petitions to withdraw suit after receiving 6,000 RMB, is sentenced to one month of criminal detention), www.whnews.cn/news_old/2007-12/03content_1252782.htm (accessed on Oct. 23, 2013).

27 "在美国 '私了' 强奸案是重罪" (In America, private settlement of a rape case constitutes a serious crime), http://newspaper.jfdaily.com/shfzb/html/2012-04/17/content_786403.htm (accessed on Oct. 23, 2013).

mechanisms, litigants often seek to utilize the mechanism that will maximize their self-interest.²⁸

While the elimination of “privately settling illicit sex offenses” as a crime under the state prosecution model has meant that litigants who wish to settle and withdraw a suit do not run afoul of the law, yet, because the state prosecution model has established a procedural process for handling rape cases, once a complaint is formally lodged with the state, the parties are not allowed to withdraw the case. This model is conducive to maintaining the unity and the predictability of the law, and at the same time is also effective in prosecuting crime and protecting the public interest. But an investigation of case records reveals that there are instances when the system does not fully accord with the wishes of the people, such as we saw with the aforementioned case between Xiaofang and Ah Li. Furthermore, the fact that parties who wish to settle a case have no other option but to lie and feign a love relationship represents a greater harm to judicial procedures and justice (and easily leads to further conflict down the road) when compared to the other possibility of just acknowledging that despite the reality of what had happened, the two parties, nevertheless, have reconciled and wish to have the case dropped.

Rape and Complaint by the Victim Herself

One way of mitigating the tension between societal and state dispute resolution mechanisms while upholding the principle of the “formalization” of the law is to bring the crime of rape within the scope of the “complaint by the victim herself” (*qin'gao* 亲告) system. The belief in sexual liberty that has swept every corner of the world in the modern era has completely divorced sex from the realm of public interest, and instead has made it purely a private matter. One after another, countries have reconceptualized rape from the former categories of “harming public morality and decency” and “damaging good social morals” to being a crime within the category of “violation of personal

28 Su Li's analysis of the private settlement of rape cases in the Chinese countryside points out that litigants who avoid the law are not doing so because they are irrational or ignorant of the law. Rather, they are making a “rational” choice to maximize their self-interest by exploiting the conflict between state law and informal practices. In the process of private settlement, state law, then, plays the role of facilitating bargaining between the two parties. See Su Li 苏力, “法律规避和法律多元” (Avoidance of the law and legal pluralism), 法治及其本土资源 (Rule of law and local resources) (Beijing: Zhongguo zhengfa daxue chubanshe, 1996), 41–49.

rights” (*qinhai renshen quanli* 侵害人身权利).²⁹ To be sure, in general all criminal actions harm both societal and personal interests protected under the law. Nevertheless, because crimes under the category of “violation of personal rights” mainly involve damage to an individual’s private rights, the victim retains greater control in these cases, thus explaining why some offenses are prosecuted only upon complaint by the victim herself. In terms of litigation procedures, the key differences between an offense prosecuted only upon complaint versus a state-prosecuted crime appear most clearly in two situations: during the procedural process before trial, whether state power can become actively involved in prosecution; and during the litigation, whether the victim has the authority to settle with the accused or withdraw the case. In countries such as Japan and Russia, rape is handled under the system of complaint by the victim herself.³⁰ And because the law in these countries construes sex crimes as a violation of a female’s sexual autonomy (性自主权), only she can judge whether her rights have been violated. She can also freely decide whether to lodge or withdraw a suit, with no interference from the state.

This problem was also taken up during the early phases of establishing the legal system in post-1949 China. In June 1955, the Shaanxi Provincial Judicial Department requested the Ministry of Justice to provide instructions on whether the court had the authority to accept rape cases when the victim does not file suit.³¹ The Shaanxi Provincial Judicial Department wrote:

Under Soviet law, rape is a crime prosecuted only upon complaint by the victim herself; the court will only accept cases initiated by the victim. When a victim is unwilling to file suit but the court forces the case to be tried, it not only harms the self-respect of women, often it also results in a situation where the victim will conceal the facts and be unwilling to speak truthfully, which then adds to the difficulty of trying the case and diminishes the chance that the judgment will be correct.

Because we are currently engaged in establishing a formal legal system, this law is worth our consideration. Nonetheless, we must decide on

²⁹ Su Caixia 苏彩霞, “域外强奸罪立法的新发展” (New developments in rape crime legislation in foreign countries), *法学杂志* (Journal of Legal Studies) no. 2, 2001: 56.

³⁰ Chen Ni 陈妮, “中外告诉乃论比较研究” (A comparative examination of prosecution only upon complaint in China and abroad), *政法论坛* (Politics and Law Forum) no. 1, 2001: 20.

³¹ “最高人民法院关于没有被害人自诉的强奸案件法院能否主动受理问题的批复” (Response from the People’s Supreme Court on the question of whether the court has the authority to accept rape cases when the victim does not file suit), www.people.com.cn/item/flfgk/gwyfg/1955/113602195501.html (accessed on Oct. 23, 2013).

the appropriate regulations according to the realities of our country's present situation and according to the principle of punishing the criminal behavior of ruffians in a swift manner in order to secure peace and order in our nation.

The Ministry of Justice handed this matter to the People's Supreme Court for a decision. The court's answer, detailed in its "Response to the Question of Whether the Court Has the Authority to Accept Rape Cases When the Victim Does Not file Suit," stated:

First, rape is a crime that seriously violates one's personal rights and damages societal public security. Soviet law states that in rape cases involving no aggravating circumstances, no prosecution can take place without the victim first filing a suit. Under our country's current situation, in typical cases of rape without aggravating circumstances where the victim does not file suit but other people have reported the matter to the court, when the People's Procurator's Office at the same level as the court possesses the ability and agrees to handle the case, the court can then hand the matter over to the procurator's office. If the People's Procurator's Office at the same level does not possess the wherewithal to handle the matter and must petition the court to directly handle the case, then the court first needs to seek truth from facts and conduct further investigation into the defendant's situation surrounding the case as well as his class status and character. The court also needs to take into consideration the opinion of the masses and investigate the reason the victim is unwilling to file suit. After doing this, the court should then decide whether to accept the case.

Second, the court, without exception, should accept all serious rape cases and illicit sex involving a female who is a minor. These cases do not require the victim, family members, or the guardian to first initiate suit.

During China's period of learning from the Soviet experience, the country's law did not just indiscriminately designate rape as a crime prosecuted only upon complaint by the victim herself. Rather, based on the need to stabilize public order, China made rape a crime handled through state prosecution, thus giving the state the authority to investigate, initiate prosecution, and try a case without requiring the victim to first file suit.

In this present age of increasing sexual liberty, the link between the violation of one's sexual autonomy and good societal morals and social order is becoming ever weaker while more emphasis is now placed on the different

choices and recourses available to the victim of a sexual crime.³² Thus, proposals to copy countries such as Japan, South Korea, and Russia and make rape a crime prosecuted only upon complaint by the victim herself have once again become a topic of heated debate within China's academic world.³³ If rape becomes a crime prosecuted only upon complaint by the victim herself, then the informal dispute resolution mechanism of societal mediation and the state's formal adjudicatory mechanism of dispute resolution would become fully substitutable resources for dispute resolution from which litigants could freely choose.³⁴ "Private settlement" could then emerge from the shadow of illegality and be transformed into the legal category of mutual settlement. Litigants' petitions to withdraw a suit because both parties have reached a mediated agreement would no longer be viewed as actions that represent a "cancer to establishing the rule of law" (*fazhi jianshe de duliu* 法治建设的毒瘤). The reconciled parties, in order to seek a withdrawal of the case, would no longer have to twist the facts and thereby put themselves in legal jeopardy.

At the same time, one cannot disregard the voices that oppose making rape a crime prosecutable only upon complaint by the victim herself. First, because many rapists are repeat offenders, allowing the rapist to settle with the victim and avoid criminal punishment, from an objective perspective, would increase the likelihood of another person being violated by the same rapist. This would destroy the people's expectations of the law and lower the public's sense of safety. By prosecuting serious violent offenders, the state can threaten and protect, at once satisfying public sentiment and restoring social order. Another important question to consider is the degree to which the process of reaching a settlement with the offender really reflects the true desires of the victim. A victim's ability to pursue prosecution of the crime or to bear the costs of

32 Li Yongjun 李拥军, "现代西方国家性犯罪立法的特点与趋向—关于完善我国当前性犯罪立法的一点思考" (Features and trends in sex crime legislation in Western countries in the modern period—some thoughts on how to improve China's current sex crime legislation), *河北法学* (Hebei Legal Studies) no. 7, 2006: 122.

33 He Chengbin 何承斌 and Gong Tingting 龚亭亭, "强奸罪立法的反思与重构" (Rethinking and reconstructing rape legislation), *现代法学* (Modern Legal Studies) no. 5, 2003: 64–68; Zhang Rong 张蓉, "对强奸罪应否作为亲告罪的思考" (Thoughts on whether to make rape a crime prosecuted only upon complaint), *东南大学学报* (哲学社会科学版) (Journal of Southeastern University [Philosophy and Social Science Edition]) no. 1, 2008: 71–74.

34 On the interaction between state statutory law and informal law and its significance to producing institutional innovations, see Su Li 苏力, "再论法律规避" (Avoidance of the law), *法治及其本土资源* (Rule of law and local resources) (Beijing: Zhongguo zhengfa daxue chubanshe, 1996), 59–73.

pursuing the case are factors that must be taken into consideration when thinking about making rape a crime prosecutable only upon complaint by the victim herself. When there are disparities in social power, an offender who possesses greater social resources vis-à-vis the victim can easily exert direct and indirect pressure to oppress and prevent the latter from freely expressing their wishes. In relationships of domination and submission, mediated agreements can easily be abused and used by the strong to bully the weak. Making rape a crime prosecutable only upon complaint by the victim herself undoubtedly opens a convenient door for social hegemony and rule by the powerful, allowing offenders to act unscrupulously and forcing victims to suffer silently, thus stripping the law of its ultimate purpose of protecting and upholding fairness and justice. The Republican-era case discussed earlier in this article involving Liu Changjiangtou's rape of a young girl and her subsequent death, and the eventual agreed-upon settlement and withdrawal of suit, very much serves as a warning for our contemporary situation. With the ever increasing polarization of today's society and the uneven distribution of power, the numerous shenanigans of the "children of the wealthy and powerful" (*fu erdai* 富二代) and "children of officials" (*guan erdai* 官二代) who are completely unfettered by the law because they can "use money to avoid punishment" (*pei qian mian xing* 赔钱免刑) have given people plenty to be wary of in terms of the phenomenon of settlements in criminal cases and the increasing trend of making rape a matter prosecuted only upon complaint by the victim herself. When looking at the legal regulations of different countries and regions, we see that in Taiwan, for example, in order to crack down on crime and to avoid the possibility of offenders using threats and inducements to settle with the victim and extract more concessions that result in even greater harm to the female victim, in 1999, rape was changed from a crime prosecuted only upon complaint by the victim herself to one that is state prosecuted.³⁵ Even where rape is a crime prosecuted only upon complaint by the victim herself, countries such as Finland, Denmark, and Switzerland have nevertheless established certain conditions governing its application.³⁶ These examples show that rape as a crime prosecuted only upon complaint by the victim herself should be implemented only in a context of general social equality and accompanied by a set of set conditions for its use. To establish no delimiting conditions whatsoever

35 Li Lizhong 李立众, "台湾岛强奸罪立法之新发展" (New developments in rape legislation in Taiwan), 人民检察 (People's Procurator) no. 11, 2000: 58–59.

36 Li Yongjun, "Features and trends in sex crime legislation in Western countries in the modern period, 122.

simply will not work. The state should especially prosecute cases involving the rape of minors to crack down on this type of crime.

From late imperial China to today, privately settling sex offenses has been an area where informal societal regulations and the formal legal system have continually jostled with each other. Along with the transition from a “substantive” to a “formalized” legal system, the tension between the representation of Qing law and its practice has evolved into the modern distinction between civil and criminal law. The denial of private settlement under the state prosecution system represents a dangerous derivative of the rigidification experienced under the “formalization” of the law. Cases that fall under prosecution only upon complaint by the victim herself are susceptible to abuse by the powerful. How to foster a positive and effective “third realm” of interaction between societal mediation and state adjudication to allow individuals and the public to benefit from being able to choose between the two sets of dispute resolution mechanisms is a problem that deserves deeper exploration.