

ABSTRACT

This thesis begins with the backgrounds of the activity of keeping Ernai – an introduction of definition, features and influence of the phenomenon of keeping Ernai. Then, based on a comparison of the activities of keeping concubine and keeping Ernai, the issue of the irrationalities of the phenomenon of keeping Ernai will be addressed.

Solving the legal issues with regard to the activity of keeping Ernai should be based on legislative techniques, such as a properly logic analysis on legal theory and social reality. So, in order to clarify the legal nature of the activities of keeping Ernai, specific regulations and definitions will be approached to reestablish a reasonable conceptual system. Based on that, the activity of keeping Ernai actually could be considered as adultery, illegal cohabitation or bigamy from legal perspective. Then, some specific issues will be discussed, such as wife's mental compensation, property rights of Ernai as well as the procedural issues of wife claiming protection of her rights.

However, with regard to the problem of the failure from legal instruments always fails to regulate the activity of keeping Ernai, legislative technique is obviously insufficient to eliminate the gaps existed between law and reality. From this point, legislation should not only focus on specific provisions, but also should keep a low profile to realize the inadequateness of law, especially on the field of marriage and family issues; otherwise, even a smart and hard working legislator could not institute a law which could be enforced effectively. In order to find the legal limitations in the area of marriage and family, "family method" will be introduced into Chapter five for its effectiveness on regulating the activity of family members, and especially on marriage and family issues. Based on this analysis, two important elements for the implementation of Chinese marriage and family law will be revealed: "people live in a community of acquaintance" and "a proper proceeding". According

to the above revealed facts, legislator should improve marriage law by the ways of strengthening the judicial function of People's Mediation Committee and paying more attention on folk law.

Furthermore, according to the analysis and illustration in this thesis, in my opinion, the legislation should follow the development of marriage attitudes like the water flow in a river. The best way for regulation is not prohibiting but is providing the channel as well.¹ Excessive limitations on the activity in marriage and family life could violate humanity and laws of nature, on which the legislators and sociologists actually have little acknowledgment.² The function of law is garbled if the legislators and the public still think that law is omnipotent, so, just as a view hold that "*law must be failing to play a role in reality if it depends on the coercive of the states*".³

¹ See Wang Yongming & Qin Shi hong, "On the Limitation of Marriage Law Establishing Consortium", in *Journal of HUST Social Science Edition*, Vol.15 No.4 Nov.,(2001), [王永明, 秦世东, 论婚姻法创设配偶权的局限性, 华中科技大学学报, 社会科学版, 2001 年 11 月, 第五卷第四期]

² Ibid.

³ This sentence is translated by the author. See Zhang Xiaohui, "Modern Gelao People's Folk law and Their Solutions to Local Disputes", in *Journal of Guizhou University for Ethnic Minorities (Philosophy and social science*, June (2007), at 6, [张晓辉, 现代仡佬族的民间法与民间纠纷解决方式, 贵州民族学院报(哲学社会版), 2007 年 6 月, 第 6 页]