DOI 10.3868/s050-012-023-0006-5

A Functional Comparison of Marital Debts in Common Law Jurisdictions: Lessons from the Model Not Accepting the Common Property Regime*

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Abstract Traditionally, the Common Law System exercises a legal separation of marital property regime between husband and wife; this regime still has interpretation theory value for functional comparison to that of China. The husband-wife personality integration in the early days of the Common Law System goes back to the original agency of necessity similar to that of the daily family agency of the Civil Law System; the aim was to strengthen marital coherence rather than protect creditors. The "daily family needs" should be identified without excluding the husband-and-wife separation period, and be based on the consumption level during the time that a couple have lived together. The current mainstream mode of the Common Law System starts from the "Consensual Approach" under the legal regime of separation of property between husband and wife, and limits the "Purpose Theory" to cases of insufficient consensual evidence. Moreover, this mainstream mode is supplemented by the "Presumption Theory" that only exists as a method of proof, and is similar to the current Chinese position of co-debt and co-signing. When a non-debtor consents a debtor to borrow money in the name of husband and wife, this consent can be used as a yardstick to determine their marital community debt and to identify the nature of various debts in the context of marital community debt.

Keywords marital joint debt, marital community debt, separation of property regime, agency of necessity

I Question

When a husband or a wife borrows money in his or her own name during their marriage, under what circumstances will it be recognized as joint marital debt, or community marital debt, or the borrower's personal debt? The question has always drawn attention from legal professionals

* This paper is translated from 华东政法大学学报 (*East China University of Political Science and Law Journal*), 2021 (1): 38–49.

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as well as from the general public.[1] Before China enacted the Judicial Interpretation of Marital Debt (Judicial Interpretation) in 2018, the core academic dispute superficially was concerned with Article 24 of the Judicial Interpretation (II) of Marriage Law, but essentially was concerned with the relationship between Purpose Theory and Presumption Theory. Some scholars point out from the perspective of empirical research that Presumption Theory is extremely unfair to the marital non-debtor.[2] Other scholars believe that the revised "Presumption Theory" is justified.[3] Some assume that the conflict between Presumption Theory and Purpose Theory can be alleviated by distinguishing the applicable scenarios of Judicial Interpretation (II) of Marriage Law.[4] Following the promulgation of the Judicial Interpretation of Marital Debt, Chinese law of marital debt has been significantly reconstructed. The Judicial Interpretation of Marital Debt starts with the Consensual Approach featuring co-debt and co-signing, supplemented by the Purpose Theory, and relegates the Presumption Theory to the proof rule under the application of the Purpose Theory, completely changing the time-based Presumption Theory in Article 24 of the Judicial Interpretation of Marriage Law (II). This practice of shifting the balance of value judgment from creditors to non-debtors has been well received by practical circles and partially praised by academic circles.[5] By 2019, the Civil Code (Draft) also entirely incorporated the Judicial Interpretation of Marital Debt, and reflected it first in Article 840 of the second-draft Marriage and Family Section in mid-2019, then in Article 1064 of the first full version at the end of 2019, and thirdly in Article 1064 of the Civil Code of the People's Republic of China (hereinafter referred to as "the Civil Code").

Chinese scholars have carried out various studies on this question. However,

1 The term "marital community debt" as mentioned in this paper is a legal concept, which is different from the concept of "marital community debt" in the Interpretation of the Supreme People's Court on Relevant Issues Concerning the Applicable Law in the Trial of Cases Involving Marital Debt Disputes (hereinafter referred to as "Judicial Interpretation of Marital Debt") and the Civil Code, the former is a narrow sense of community debt (the responsible property is the personal property of the debtor and the marital Common Property, excluding the personal property of the non-debtor). It is not only different from the personal debt of the debtor (the responsible property is the debtor's personal property and the corresponding share of the marital Common Property), but also different from the marital joint debt (the responsible property is the debtor's personal property, the non-debtor's personal property and the marital Common Property); the latter is general sense community debt, which generally covers narrow sense of marital community debt and marital joint debt, and is only different from the personal debt of the debtor.

2 See YE Mingyi, 婚姻法解释（二）第 24 条废除论——基于相关统计数据的实证分析 (On the Abolition of Article 24 of the Interpretation of Marriage Law (II)—Empirical Analysis Based on Relevant Statistics), 6 法学 (*Law Science*), 35–36 (2017).

3 See LI Hongxiang, 夫妻一方以个人名义所负债务清偿规则之解构 (Deconstruction of the Rules for Paying Off the Debts Incurred by One Spouse in His or Her Own Name), 2 政法论丛 (*Journal of Political Science and Law*), 82–83 (2015); RAN Keping, 夫妻团体债务的认定及清偿 (Determination and Settlement of the Marital Debts), 5 中国法学 (*China Legal Science*), 121–125 (2017).

4 See SUN Ruojun, 论夫妻共同债务"时间"推定规则 (On the Presumption Rule of "Time" of Marital Community Debt), 1 法学家 (*The Jurist*), 149 (2017).

5 See MA Xianxing, 夫妻债务司法认定及实案评析 (*Judicial Determination of Marital Debt and Analysis of Real Cases*), Law Press · China, at 273–300 (2018); LI Hongxiang, 我国夫妻共同债务构成依据的反思 (Reflection on the Evidence of the Marital Community Debt in China), 7 江汉论坛 (*Jianghan Tribune*), 101 (2018). For the criticism of this judicial interpretation, see WANG Zhantao, 日常家事代理之批判 (Criticism of Daily Family Agency), 3 法学家 (*The Jurist*), 138 (2019).

from the perspective of comparative law research, one can see that most of these studies focus on Civil Law Systems represented by those in Germany and France, while the study of Common Law System is relatively weak. Let us take the United States as an example. Chinese scholars have found that 10 US states have adopted the marital Common Property system, which offers useful references for China.[6] However, these 10 states are in the minority in the US, and further studies have found, based on their geographical locations and historical changes, that most of these states were formerly either a French colony (Louisiana) or Mexican territories (Arizona, California, Nevada, New Mexico, Texas) prior to the Mexican-American War in 1848. Thus, these states were deeply influenced by Civil Law traditions rather than the US inheritance of Common Law traditions. On the contrary, under the influence of the English law, most US states, as well as jurisdictions such as Australia, Canada, New Zealand, Singapore and Chinese Hong Kong, have historically adopted the system of marital doctrine of unity and the agency of necessity, and now they have also adopted the regime of legal separation of marital property; unless there is a specific agreement or a few cases of presumption, husband and wife will not hold Common Property in principle because of marriage, let alone community debt.[7] Therefore, although the traditional mode of Common Law can compare with Civil Law on the subject of joint marital debt, they cannot compare on the subject of marital community debt. However, if we set the question as "whether either one party or both parties of a marriage bear the legal consequences of a marital community debt," and make a functional comparison of the "Consensual Approach," "Purpose Theory" and "Presumption Theory" as the starting point, we can still draw many interesting and quite instructive observations. Although the systematic treatment of the marital debt system in the Section of Marriage and Family of the Civil Code includes the elements of explanatory choice, value judgment and legislative technology, it is also necessary to first make a comprehensive comparative study of the fact judgment. Given the fact that the Chinese scholars have answered the question of fact judgment in the main jurisdictions of the Civil Law System and some US states that exercise the Common Property system, this paper intends to analyze the main jurisdictions of the Common Law System that do not adopt the Common Property system, in order to complete the puzzle of fact judgment by a comparative law approach, and to present its interpretation value to the rules of marital debt compiled in the Section of Marriage and Family of the Civil Code.

6 See MIAO Yu, 美国夫妻共同债务制度研究——以美国采行夫妻共同财产制州为中心 (On the Marital Community Debt in the United States—Focusing on the Common Property States), 2 法学家 (*The Jurist*), 15–31 (2018).

7 See Sonia Harris-Short, Joanna Miles & Rob George, *Family Law: Text, Cases, and Materials*, 3rd edition, Oxford University Press, at 123 (2015); Brian Bix, *The Oxford Introductions to US Law: Family Law*, Oxford University Press, at 30–31(2013); Belinda Fehlberg & Lisa Sarmas, "Australian Family Property Law: Current Issues and Challenges," in Shazia Choudhry & Jonathan Herring eds., *The Cambridge Companion to Comparative Family Law*, Cambridge University Press, at 109 (2019).

II The Beginning of the Traditional Common Law: Purpose Theory Only

A complete functional comparison depends on studies of system origins. A study of the evolution of agency of necessity in the UK has shown that agency of necessity was created to reconcile the non-independence of the wife's subjective status, so the agency of necessity functioned to facilitate protection of the wife's daily life. The agency of necessity and the daily family agency both imply the normative logic of "determining debts by purpose," so when constructing the Interpretation Theory of Article 1064 of the Civil Code, the standards for determining debts in terms of the agency of necessity can be referenced.

A | The Doctrine of Unity and the Agency of Necessity

The basic understanding of the marriage in the early English law is "two souls in one flesh," and the principal legal consequence of marriage is the doctrine of unity. Sir William Blackstone, British jurist in the 18th century, described the doctrine of unity as "the personality of women is terminated at the time of marriage, or it is merged and integrated into the personality of husbands."[8] The word "Coverture" is a proper term in Common Law to describe married women's legal incapacity for civil rights and conduct. On one hand, this one-way legal fiction provides the wife with extra protection, such that the wife does not have to pay her husband's debts; if the husband is present when the wife commits a crime, the law presumes that she is coerced by her husband, and the wife will not bear criminal responsibility without evidence to the contrary. But on the other hand, the doctrine of unity also brings inconvenience to the wife's daily life, because the wife has no capacity for civil rights, and naturally she has no capacity for civil conduct and no qualification as a litigation subject. When the wife suffers from infringement, only the husband can sue the third-party infringer; when there is a marital infringement dispute, neither is liable for infringement. Initially, Common Law strictly followed the doctrine of unity, while equity partly followed it. However, equity only recognized the property right of married women, allowing her to undertake external guarantee liability with her specific property, but not allowing her to undertake general contractual liability with all her personal property. Therefore, the wife could not enter into a contract with the external world. When she was out on her own, it was difficult for her to buy or sell, borrow money, or pay for meals and accommodations.

To address this issue, agency of necessity gradually came into being in the English Law from the 14th century to the 16th century, whose core concept was that without the husband's pre-authorization, normally the wife's external trading contract was undetermined, and would be invalid without the husband's subsequent ratification. However, when a wife bought necessities such as food and clothes, although she had no capacity to determine

8 Sir William Blackstone, *Commentaries on the Laws of England*, Vol. I, JB Lippincott Co., at 442 (1893).

on her own, the law regarded her as having the right to do so, even if her husband did not authorize her to buy the necessities. The law still saw her as her husband's agent, and she could "pledge her husband's credit" to buy on credit, so that her husband would bear the legal agency consequences; that is, the store being the creditor had the right to claim debts from her husband.[9] Initially, if the husband did not want to bear the debt, he had to inform the creditor in time before the transaction was completed, so that the creditor knew that the wife did not have the husband's authorization. Later, the law no longer allowed the husband to unilaterally take away the power of attorney granted to his wife. Certainly, if the wife colluded with the creditor maliciously, then the husband could be exempted from the liability of the principal.[10] From the Agency Law perspective, the agency of necessity is an atypical emergency agency, because generally the emergency agency refers to the agent acting without pre-authorization in order to satisfy the urgent needs of the principal. However, the agency of necessity in the context of husband and wife refers to the agent acting without pre-authorization in order to satisfy their urgent needs. Therefore, some scholars of Agency Law assume that the Marriage Law cannot solve the wife's needs with its own inherent system, so that the Agency Law has been specifically amended for satisfying the value orientation of Marriage Law.[11]

In the middle and late 19th century, the doctrine of unity and the agency of necessity failed to work with the First Industrial Revolution British society, and this triggered a series of legislative reforms in the Victorian era.[12] Among them, Article 1 of the Married Women's Property Law of 1882 clearly recognized the wife's capacity for civil rights, civil conduct and civil responsibility, and stipulated that: A woman's post-marriage income, like her pre-marriage income, is her personal property; in principle, a wife's external debt is her personal debt, and she is responsible for all her personal property; if she is insolvent, she is regarded as an unmarried woman, triggering her personal bankruptcy and not implicating her husband.[13] Since then, a wife with personal property has gained civil rights and capacity for civil conduct, while a wife without personal property still had no capacity for civil conduct. In 1935, the UK Parliament reiterated the above-mentioned position in the Statute Law in the field of tort, and created a series of exception rules; yet the doctrine of unity nor the agency of necessity was utterly abolished.[14] In 1970, the UK Parliament officially abolished the agency of necessity.[15] In 1982, it then terminated the legal fiction of the doctrine of unity by precedent, so that the wife finally gained full capacity for

9 See John Baker, *An Introduction to English Legal History*, 4th edition, Oxford University Press, at 487–488 (2007).
10 James v. Warren (1706) Holt K.B. 104, 90 ER 956.
11 See Peter G Watts ed., *Bowstead & Reynolds on Agency*, 22nd edition, Sweet & Maxwell, para. 4–011 (2020).
12 See Stephen Cretney, *Family Law in the Twentieth Century: A History*, Oxford University Press, at 92–100 (2005).
13 Married Women's Property Act 1882, s. 1.
14 Law Reform (Married Women and Tortfeasors) Act 1935, s. 1.
15 Matrimonial Proceedings and Property Act 1970, s. 41.

civil conduct.[16] From 1882 to 1982, English judicial practice fundamentally treated the wife who lived with her husband differently from the wife who was separated from her husband— the former's marital income still belonged to her husband, the external civil legal behavior had to leverage the agency of necessity, and the husband assumed the debt; the courts considered a separated wife, only, as having the capacity for civil right, with external responsibilities based on the limit of her personal property obtained during the marriage. Certainly, if the separated wife bought necessities, the husband still needed to pay the debt in the name of the principal.

B | Agency of Necessity and Agency of Daily Family

The main difference in legal consequences between the agency of necessity in the UK and the agency of daily family in Germany is the nature of the debt. Based on the different legislation examples, the debt arising from the family trading agency is a joint marital debt, or a community debt or a supplementary debt, but is not personal debts.[17] On the contrary, the debt incurred in trading through the agency of necessity had to be the husband's personal debt. Before 1882, the wife did not have the capacity for civil right and civil conduct; it was impossible for her to bear personal debt, joint debt or community debt. Even after 1882 when the wife was the agent of her husband, the husband still had to bear the legal consequence naturally.

The most common ground between the agency of necessity and the agency of daily family is their shared legislative purpose. Chinese scholars generally have two interpretations of the legislative purpose of the daily family agency of Civil Law. The first is that the daily family agency results from three kinds of value balance: facilitating family life, respecting individual autonomy and protecting transaction security.[18] The second is that the daily family agency theoretically aims to strengthen the marital maintenance community, and is not meant to primarily protect the creditors, or even to protect the creditors at all. By limiting the applicability of the daily family agency and adopting the objective standards to identify the necessities of family daily life, daily family agency plays an indirect role in protecting transaction security, but this is only a consequence of reflection and, incidentally, of the daily family agency.[19]

Similar to the above-mentioned

16 Midland Bank Trust Co Ltd. v. Green (No. 3) [1982] Ch 529, 538-9 (Lord Denning), 542 (Sir George Baker). In this case, the husband and wife maliciously colluded to harm the interests of the third party, who sued the couple for malicious collusion. The couple argued that the doctrine of unity meant that they were of one single person, and at least two actors were needed to perform "malicious collusion," so their conduct could not constitute malicious collusion in the sense of tort law. The first-instance judges of the High Court and the second-instance judges of the Court of Appeal both rejected this defense and strongly criticized the ancient doctrine of the unity.

17 See MIAO Yu, 走出夫妻共同债务的误区——以《婚姻法司法解释（二）》第 24 条为分析对象 (Getting out of the Misunderstanding of Marital Community Debt—An Analysis of Article 24 of Judicial Interpretation of Marriage Law [II]), 1 中外法学 (*Peking University Law Journal*), 267-269 (2018).

18 See MA Yinan & YANG Chao, 日常家事代理权研究 (A Study on the Daily Family Agency), 4 法学家 (*The Jurist*), 28-30 (2000); see YE, fn. 2 at 43.

19 See MIAO, fn. 17 at 270; RAN Keping, 论因"家庭日常生活需要"引起的夫妻共同债务 (On the Marital Community Debts Caused by the Daily Family Needs), 7 江汉论坛 (*Jianghan Tribune*), 108 (2018).

second interpretation, the agency of necessity did not originally mean to protect creditors, but to strengthen the marital community and facilitate the wife's daily life, so that she was not constrained by the legal fiction of the doctrine of unity; she could then shop on credit and secure loans. The scope of agency in the agency of necessity refers to the necessities a wife buys for her own use, but also the necessities she buys for her children. Moreover, the scope of necessity refers to movable property such as clothes and food, but also services such as accommodation, medical care and children's education. One can see that although the person who directly benefits from the agency of necessity is the wife, the legislative purpose of this scheme is to protect the wife and to maintain the traditional family composed of husband, wife and children; that is, to strengthen the marital community.

With regard to the agency of necessity, the creditor can claim compensation from the husband as the principal, which seems to protect the creditor, or the apparent agency, which is actually just a by-product of the agency of necessity, because creditors have not benefited. Assuming that there is no agency of necessity, where husbands shop on credit and get loans, creditors can naturally claim their rights straight from those husbands, without suffering any loss for non-existence of agency of necessity. Suppose that the wife who separated after 1882 from her husband secured loans, and the agency of necessity did not exist, although the creditor could request enforcement of liability which had shifted from the husband to the wife, the creditor had to lower his or her compensation expectation for lack of this agency of necessity, thus narrowing the gap between the creditor's expected compensation sum and the actual compensation sum. Being rational, creditors naturally lend lower loan amounts or enter into more demanding loan contracts. Therefore, it is the wife, not the creditor, who really suffers the most for lacking the agency of necessity. Therefore, the agency of necessity aims not at protecting creditors, but at supporting the marital community.

C | Agency of Necessity and Daily Family Needs

Although the agency of necessity has become history, it is still valuable for interpretation of the current rules of Purpose Theory in China. How should the extension of Article 1064.1 and 1064.2 of the Civil Code, that is "the debt for daily family needs" and "the debt beyond daily family needs," as described in Articles 2 and 3 of the Judicial Interpretation of Marital Debt be interpreted? When couples live together, "the family daily life" is easier to interpret. However, when they are separated, even if the expenses for raising and educating the children living with one of them are interpreted as for "the family daily life," whether one spouse can be required to jointly pay for the personal consumption of the other during the separation period, and what standards are referenced to determine the scope of their respective responsibility has large room for interpretation.

There have been similar doubts in English laws, and there are four optional

standards for determining the scope of responsibility: (1) according to the necessary expenses for maintaining the wife's basic life; (2) according to the husband's living standard at the time of separation; (3) according to the wife's living standard at the time of separation; (4) according to the living standard when husband and wife live together. Generally, standard (4) is more reasonable and more strongly supported by the court.[20] According to Lord Denning, no matter whether husband or wife has better financial conditions, their family daily life should be determined according to the concept of the "family pool." As long as they are not divorced, the separated couples should help each other as they do when they live together, so as to supplement deficiency and diminish superabundance.[21] Certainly, articles of mere luxury cannot be included in the concept of "family daily life" in any case, even if purchasing them is a part of the daily life of one party when they lived together. However, articles of mere luxury and luxurious articles of utility are different concepts, and can be mutually referenced, as there is a gray area between them.[22]

Chinese scholars hold slightly different views on the theoretical interpretation of "daily family needs." (1) Some of them adopt the couple living together standard. They believe that a loan less than twice the annual marital income is a small loan, which can be presumed to be a debt for "daily family needs." Moreover, they believe that a big loan only requires a shift in the burden of proof, husband or wife cannot be absolutely excluded from the community debt, and the objective and genuine standard used in the non-loan contracts can be named "the specific party standard."[23] This view focuses on the living standard of husband and wife, and is not influenced by the class or consumption level of an average person, which is more consistent with the concept of family pool as in the rules of English law mentioned above. (2) Some scholars are relatively conservative. They suggest reference to similar couples' standard of living, and judging whether their debt is for the "daily family needs" based on the average consumption level of similar couples, and this standard can be named "the same-class party standard."[24] Therefore, when a middle-class couple who are accustomed to high-end consumption disputes over the family agency, the court needs to leverage the average middle-class couple to define the consumption level, which is bound to lower the couple's family agency debt cap. (3) Some scholars are more conservative, thinking that as long as the consumption is not luxury and excessive for average people, it should be regarded as "family daily needs" and should be named "the average party standard."[25] As such, the debt cap of high-end consumption middle-class couples is significantly lowered, the expenses of their children studying abroad cannot be included in the joint reimbursement quota,

20 Guenter Treitel, "The Deserted Wife's Right to Pledge Her Husband's Credit for Necessaries," 16 *Modern Law Review*, 221-224 (1953).
21 Biberfeld v. Berens [1952] 2 QB 770, 783-784.
22 Chapple v. Cooper (1844) 13 M. & W. 252, 153 ER 105.
23 See MIAO, fn. 6 at 29.
24 See RAN, fn. 19 at 107.
25 See YE Mingyi, "共债共签"原则应写入民法典 (The Principle of "Co-Debt and Co-Signing" Should Be Written into Chinese Civil Code), 1 东方法学 (*Oriental Law*), 99-100 (2019).

even if their children previously attended high-cost educational institutions such as private schools and international schools.

Reviewing the original purpose of the daily family agency and the agency of necessity, the author believes that the above viewpoint (1) is preferable. As mentioned above, the original purpose of these two agencies is to protect the vulnerable party, while it is only an objective collateral effect of these two agencies to give due consideration to the creditor; the seeking-internal-compensation husband or wife should not suffer any loss for protecting the creditor. Therefore, although the externalities of the above viewpoints (2) and (3) are gradually increasing, the viewpoint (1) acts more to protect the vulnerable party in a specific marital relationship, so that the vulnerable party, either living together or separated from the spouse, can maintain the previous level of consumption for the party and the children. Viewpoint (1) is in line with the original purpose of the two agencies. Moreover, the more external viewpoints (2) and (3) may not always be more effective than viewpoint (1) in protecting creditors, such as when creditors can prove that the debts of high-end consumption by the debtor (such as their luxury goods or the high tuition fees of their children) are consistent with the consumption habits of the debtor and the children. Following the Interpretation Theory of viewpoint (2), the debtor's spouse can plead that the consumption does not conform to the consumption habits of the same class; following the Interpretation Theory of viewpoint (3), the debtor's spouse can easily plead based on the living standard of average people; only when following the Interpretation Theory of view (1) can the debtor's spouse argue that the consumption is a luxury. In brief, it is understandable to use the "large amount and small amount" as the principled debt interpretation standard of "family daily needs," but when judging whether a debt is a large-amount or a small-amount, the judge has to decide based on the living standards and consumption habits of the specific party living together with the spouse. This "specific party standard" does not need to be influenced by the same-class marital consumption habits or even by the local average people. Because the local court has the guiding limit regarding "large amount or small amount" (such as 100,000 or 200,000) the debt beyond the given limit cannot be considered the personal debt of the borrower. In brief, when a loan is deemed a debt entirely for "the daily family needs," then this debt shall be the business of "this couple," which is neither the business of "the same-class couple" nor the business of "all couples."

In addition to the above-identified "family daily needs" that can adopt the specific party's standard of living, the agency of necessity of English law offers China another reference to the marital community debt interpretation theory; that is when the couple are separated, the expenses that one spends in raising the children can, in principle, fall into the category of "necessities" according to English law, or the category of "family daily needs" according to Chinese law.[26]

26 Bazeley v. Forder (1868) LR 3 QB 559.

However, this is limited to the separation scenario where the party effectively raises a child and has no fault, such as in a case where she takes the child back to her parents' home because of postpartum depression, and separates from her husband.[27] On the contrary, if a wife raises a child and is separated from her husband because of her adultery, then her living expenses cannot be classified as necessities, that is, as the daily family needs.[28] Regarding the context of separation, some Chinese courts have made clear their position. Article 2 of the Notice of Zhejiang Higher People's Court on Hearing Cases Involving Marital Debt Disputes points out that if "the debt incurred during the period of the couple's uneasy relationship such as separation and divorce proceedings, the creditor knew or should have known about such a separation," then this scenario shall be assumed as "the consideration factor for courts at all levels to determine the debt beyond the daily family needs." If interpreting the judgement of Zhejiang Higher People's Court according to the above-mentioned precedent rules of English Law, one should think that even if the debt incurs during the couple's separation, as long as the debtor is the one who actually raises the children, the court should not determine that the debt, incurred for oneself or for the children, is beyond the scope of "family daily needs" just because of the separation fact. Instead, one should consider the specific reasons for the separation, that is, whether the fault is in the one who actually raises the children, and then make a judgement.

III Modern Mainstream Mode of the Common Law System: Intertwining Consensual Approach, Purpose Theory and Presumption Theory

There are two theoretical difficulties in interpreting the marital debt rules in China: how to interpret the relationship between consensus and joint debt, and how to interpret the relationship between daily family agency and community debt. Undoubtedly, the daily family agency is a fiction of law, and the joint debt and community debt can also be produced by the fiction of law. Thus, the legal consequence of one party's behavior "having effect on both parties" in the daily family agency scenario is a joint debt or a community debt, requiring further discussion on the case-by-case basis. The English law interpretation on this issue offers valuable reference.

A | Legal Separation of Marital Property Regime and Consensual Approach

Although English law abolished the agency of necessity and the doctrine of unity in 1970 and 1982 respectively. Since the legal marital Common Property had a short history, major jurisdictions of the Common Law System did not accept the European Civil Law's "marital community debt+joint debt + supplementary debt" as their mainstream debt models, but directly slipped to the other extreme—marital

27 Lilley v. Lilley [1960] P. 158.
28 Govier v. Hancock (1796) 6 T.R. 603, 101 ER 726.

property and debts are totally independent from each other. Following the legal separation of marital property regime, the wife's creditors cannot claim creditor's rights from her husband in principle.[29] Certainly, as a matter of principle, the legal separation of marital property regime does not rule out the possibility that the two parties particularly agree on Common Property and community debt based on a Consensual Approach.[30]

Interestingly, China and major European jurisdictions have long regarded the legal marital Common Property regime as a general rule. Thus, many Chinese scholars studying Civil Law have found it quite surprising to first know the legal separation of Common Property regime of the Common Law System. In addition to the above-mentioned statutory provisions in the field of marriage and family, the important evidence regarding adoption of the legal separation of the marital common property regime in the UK comes from the "undue influence" of Contract Law. Undue influence means that one party to a contract does not apply public threats, but takes advantage of the party's potential influence on the other party to the contract, or does not take the form of threats at all, but abuses the trust of the other party to the contract.[31] The reason why English law established undue influence as one of the vitiating factors of contractual rescission between the untrue manifestation of intent (such as fraud) and the unfettered manifestation of intent (such as duress) lies in the main realistic driving factor of the wife's behavior of providing guarantee for her husband's debts under the legal marital property system. Comparing Germany and the UK, based on the daily family agency, in Germany the husband borrows money in his own name within the scope of daily family agency without the authorization of his wife, and the debt generated by this transaction is not the husband's personal debt. Therefore, whether the object of the creditor's application for enforcement is the marital Common Property or the personal property of the wife, is not based on the premise that the wife signs a guarantee contract or creates a charge.[32] On the contrary, if the same situation happens in England, because modern English law adopts the legal separate property system, and does not recognize the daily family agency right or the marital community debt, the creditor must get the wife's signature and determine the nature of the debt as the marital joint debt before executing the property under the wife's name. If the husband and wife have agreed on the tenancy in common, the creditor cannot enforce the wife's joint share without the wife's signature, regardless of whether the husband is bankrupt or not.[33] Even if the husband and wife have agreed on joint tenancy of specific property, this

29 Law Reform (Married Women and Tortfeasors) Act 1935, s. 3.

30 Law Reform (Married Women and Tortfeasors) Act 1935, s. 4 (2) (c).

31 See John Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer*, 3rd edition, Hart Publishing, at 194 (2016).

32 Some scholars believe that the daily family agency also exists in China, and its preliminary form is seen in Article 17 of Judicial Interpretation of Marriage Law (I). See XIA Yinlan, 我国夫妻共同债务推定规则之检讨 (Review on the Presumption Rules of Marital Community Debts in China), 1 西南政法大学学报 (*Journal of Southwest University of Political Science and Law*), 32 (2011).

33 Nigel Lowe & Gillian Douglas, *Bromley's Family Law*, 11th edition, Oxford University Press, at 159 (2015).

joint tenancy will trigger "severance" due to the creditor's enforcement application, and will be degraded to the tenancy in common, resulting in the creditor still unable to enforce the wife's corresponding share in the joint tenancy.[34] Influenced by English law, the same practice is followed in Australia, Canada and Chinese Hong Kong.[35]

The legal marital property separation system in English law is based on the Consensual Approach, which is similar to Article 1 of the Judicial Interpretation of Marital Debt in China. Although there may be no legal marital community debt according to the traditional Common Law, yet following the Consensual Approach, a specific debt can be set as marital joint debt (such as charge of a house under the name of wife only) or functionally marital community debt (such as charge of a house under the name of both husband and wife). In this case, the legal starting point is indeed "co-debt and co-signing." But the Consensual Approach does not merely stop at the signature, it requires that the actor's manifestation of intent must be true and valid.[36] In China, empirical studies have pointed out that the judicial practice of marital debts mostly concerns contractual debts, among which the disputes over loan contracts are the most frequent, while the debts of infringement, unjust enrichment and negotiorum gestio are very rare.[37]

Therefore, the essential problem of "co-debt and co-signing" relates to application of the general rule of untrue meaning expression in contract law to the particular context of marital debt in Marriage and Family Law.

In the UK, facing the creditor's request to repay the debt, the wife often claims that she has been unduly influenced and demands to rescind the guarantee to avoid the enforcement of personal property or joint shares. Theoretically, undue influence is a vitiating factor that falls between the untrue manifestation of intent and the illiberal manifestation of intent, and that is intended to fill the loopholes and prevent one party from making profits through improper behavior in the gray area between fraud and duress.[38] Unlike in the cases of fraud and gross misunderstanding, no mistake of law exists between the two parties to the contract involving undue influence, so the untrue manifestation

34 Williams v. Hensman (1861) 1 J. & Hem. 546, 70 ER 862. The dichotomy of joint tenancy and tenancy in common in English law has something different and in common from that of co-ownership and several co-ownership in Chinese law. Generally, the joint tenancy in English law is a kind of high-closeness common ownership, and is higher than that in Chinese law. This is because the joint tenancy owners enjoy the "right of survivorship"—when one of the joint tenancy owners dies, his or her share of joint tenancy interests belongs to the rest joint tenancy owners, not to his or her heirs. The closeness of the tenancy in common in English law is similar to that of the several co-ownership in Chinese law—the tenancy in common has divisible shares, and the shares among the tenancy in common owners can be unequal and can be disposed of or inherited.

35 Andersons Solicitors v. Schigulski [2004] SASC 21; Power v. Grace [1932] OR 357, [1932] 2 DLR 793; Ho Wai Kwan v. Chan Hon Kuen [2015] 1 HKLRD 901, [2015] HKCFI 92.

36 See XIA Yinlan, 双方合意是认定夫妻共同债务的重要条件之一 (Mutual Consensus Is One of the Critical Conditions for Determining the Marital Community Debt), 人民法院报 (*People's Court Daily*), Jan. 18, 2018.

37 See CAI Lidong & LIU Guodong, 关于夫妻共同债务认定的立法建议——以相关案件裁判逻辑的实证分析为基础 (Legislative Suggestions on the Determination of Marital Community Debts—Based on Empirical Analysis of Adjudication Logic of Related Cases), 2 中国应用法学 (*China Journal of Applied Jurisprudence*), 152 (2019).

38 See Hugh Beale, *Chitty on Contracts*, 33rd edition, Sweet & Maxwell, para. 8-059 (2018).

of intent is not true in a narrow sense; unlike duress, no enforcement of person or property exists between the two parties to the contract involving undue influence, triggering no fear or economic duress, so the illiberal manifestation of intent is not true in a narrow sense. De facto, undue influence is not the cause of rescission of juridical acts recognized in the Book on General Provisions of the Civil Code; however, de jure, considering the situation of undue influence, the actor should be allowed to exercise the power of rescission in value judgment. In this regard, there are the following two interpretation options. Option 1: expansion of the interpretation of duress. Some scholars have pointed out that the concept of duress in Chinese law has large room for interpretation.[39] Along this line of thought, the undue influence of a husband on his wife may be interpreted as duress in a broad sense. The "duress must be realistic and urgent" in the unchanged elements of duress, and extend to the fear of the coerced party, if refusing to sign, from property and personal injury to the vacillation of identity relations, such as the fear of divorce, cold violence and other severe consequences. Option 2: expansion of the interpretation of "true manifestation of intent." Some scholars have pointed out that the General Part of the Civil Code takes a positive enumeration approach to the general constituent elements of juridical acts. Compared with the negative list approach, it has some disadvantages, such as incomplete distribution, inaccuracy, overbreadth and misleading effect.[40] However, as every coin has two sides, the positive enumeration approach just leaves room for China to accept the undue influence system at the level of value judgment. Although the typical situation of undue influence is between fraud and duress in the negative list, it is impossible to find a corresponding pigeon hole. According to the positive list of Article 143 of the Civil Code, the act of co-signing is deemed invalid based on the Interpretation Theory, because the co-signing under undue influence is not an "true manifestation of intent."

B | Relationship Among Consensual Approach, Purpose Theory and Presumption Theory in the System of Undue Influence

According to the different methods of proof, undue influence can be further divided into actual undue influence and presumed undue influence. Actual undue influence is that which can be directly proved based on evidence and presumed undue influence concerns cases in which one party has a strong influence on the financial decision of the other party based on a specific trust relationship: Argument based on presumed undue influence can be overturned with rebuttal evidence.[41] Judging from past cases, the wife needs to provide evidence to prove the actual undue influence that she has suffered, making

39 See HAN Shiyuan, 合同法总论 (*The Law of Contract),* 4th edition, Law Press · China, at 260 (2018).

40 See WANG Yi, 民法总则法律行为效力制度立法建议 (Legislative Suggestions on the Validity System of Juridical Acts in the General Rules of the Civil Law), 2 比较法研究 (*Journal of Comparative Law*), 176-177 (2016).

41 Royal Bank of Scotland Plc v. Etridge (No. 2) [2001] UKHL 44, [2002] 2 AC 773.

overturning already-made decisions difficult in practice. Often, only when the husband has enough evident dominance or even bullying behavior to his wife can the wife successfully advocate actual undue influence. For example, under the double pressure of the husband and a solicitor, the wife may sign a guarantee contract with tears and so tie the charge on her house. Based on such an evident fact, which is similar to duress, a wife can rescind the contract on the grounds of undue influence, so that her property is free from enforcement by creditors.[42] In contrast, the presumed undue influence seems to be a simpler method for the wife to rescind the "co-signing" because of the inversion of the burden of proof. However, according to the tradition of Common law, most legal relationships that are subject to presumed undue influence overlap with the fiduciary relationship, such as the guardianship between parents and their biological[43] and non-biological-children,[44] between solicitors and their clients,[45] doctors and their patients,[46] all of which involve a somewhat fiduciary duty. However, the relationship between husband and wife is different, so it is difficult for the law to hold that the husband has a fiduciary duty to his wife, so it is not willing to presume that the husband has any undue influence on his wife. As pointed out by the Australian High Court, in order to maintain the traditional concept of "the man is the master outside and the woman is the master inside," the law should not deny evaluating the wife's emotional subordination and financial support to her husband in matters such as external guarantee.[47] However, with the wife's subordinate status gradually weakening, the law has to shift from an Identity Theory to a Consensual Approach. By the end of the 20th century, as in the case of the general criteria for judging a fiduciary relationship, the UK House of Lords also stated in the case of Barclays Bank v. O'Brien that where the wife handed over all her past financial decisions to her husband, it could be presumed that the husband had undue influence on her.[48] Thus, the wife's burden of proof is significantly reduced, and the position of the Consensual Approach is further consolidated.

However, it is also under consideration of undue influence that the once-declining Purpose Theory came back in the form of the abolition of agency of necessity. Specifically, no matter whether the wife proves that her guarantee behavior is flawed by evidence or presumption, as long as she wants to exercise the power of rescission based on undue influence, she must prove that the transaction is

42 Bank of Credit and Commerce International SA v. Aboody [1990] 1 QB 923.

43 Powell v. Powell [1900] 1 Ch 243.

44 Taylor v. Johnston (1882) 19 Ch D 603.

45 Willis v. Barron [1902] AC 271.

46 Dent v. Bennett (1839) 4 My. & C. 269, 41 ER 105.

47 Yerkey v. Jones (1939) 63 CLR 649, 675 (Dixon J). However, some scholars have noted that unlike the UK and Australia, Canada is more willing to recognize the legal fiduciary relationship between husband and wife in their national context and include undue influence in the category of violation against fiduciary duty. See M. H. Ogilive, "The Fiduciary Nature of Spousal Surety Agreements in Banking Law," 42 *Canadian Business Law Journal*, 245, 263-266 (2005).

48 Barclays Bank v. O' Brien [1994] 1 AC 180, 190 (Lord Browne-Wilkinson), followed by Midland Bank v. Greene (1995) 27 HLR 350.

evidently unfavorable to her.[49] In the case of BCCI v. Aboody, although the wife had evidence to prove that she had signed three guarantee contracts and three charge contracts under the undue influence of her husband, the court of appeal allowed the creditor to enforce all her personal property, including her charged personal property. This is because, although the loan was not directly used for "husband and wife living together," the funds were injected into a company where only the husband and wife held shares. The wife only held the equity of the company and did not participate in the actual management of the company, while the husband did not decide on family matters. However, because the financial source of the wife's housekeeping was the profit of the company, the loan belonged to the debt generated for the common production and operation of the husband and wife, which was not "evidently unfavorable" to the wife, and the wife could not apply undue influence to rescind her own guarantee behavior.[50] The opposite understanding of "evident loss" shows that this standard is actually the benefit standard, which embodies the Purpose Theory.

But the Consensual Approach also immediately fights back. After all, from the traditional basis of English law, there should be no transition zone between the flawed manifestation of intent and the contractual rescission, unless the flawed manifestation of intent is not related to the main content of the contract. Therefore, in the case of CIBC Mortgages plc v. Pitt, the UK House of Lords overturned the precedent of the Court of Appeal in the case of BCCI v. Aboody. The House of Lords believed that the guarantee rescission was based on actual undue influence, and because the wife had clearly proved undue influence exerted by the husband, it was no longer necessary for the wife to bear any evident loss. However, due to the weak probative force of presumption and the technical reasons of updating Common Law cases (this case is of the actual undue influence rather than of the presumed undue influence), the wife's evident loss was still regarded as an essential factor in determining joint and several debts, because the wife could use the evident unfavorable facts to prove that her guarantee consensus did not exist.[51] In addition, some English legal scholars have questioned the Purpose Theory from the perspective of law and society, arguing that the wife's participation in the management, even if the wife has a 50% share, cannot actually share the benefits equally with her husband. As for the wife's benefit standard, even if the wife holds the family financial power and has the real estate to her own name, essentially she provides guarantee to her husband in business management, and she cannot share the benefits equally with her husband. Therefore, for the traditional family structure of "the man is the master outside and the woman is the master inside," the Purpose Theory cannot actually make the husband and wife equally share the rights and responsibilities in their

49 National Westminster Bank Plc v. Morgan [1985] AC 686.
50 Bank of Credit and Commerce International SA v. Aboody [1990] 1 QB 923.
51 CIBC Mortgages plc v. Pitt [1994] 1 AC 200.

family business management.[52] On the whole, however, the Purpose Theory has been successfully untied with the agency of necessity, and found a place in the modern English legal system dominated by the Consensual Approach; that is, the Purpose Theory plays an auxiliary role in determining consensus and protects creditors in the context of presumed undue influence.

C | Sino-UK Comparison on the Triangle Relationship among the Consensual Approach, the Purpose Theory and the Presumption Theory

From the perspective of functional comparison, modern English law and Chinese law are different in the interpretation of the relationship between the Consensual Approach and the Purpose Theory. The Purpose Theory only plays a minor role in English law, and cannot be applied to situations where there is no need of co-signing, such as of the wife's signature. Only when there is no clear evidence to prove that the wife's manifestation of intent is true and valid can the creditor invoke the Purpose Theory, and prove that the loan really benefits the wife indirectly and does not constitute an "evident loss" to supplement the wife's manifestation of intent to provide guarantee. However, in Chinese law, the Purpose Theory is applied in more extensive scenarios, including cases in which the consensus is ambiguous and no consensus exists—even if the consensus of "co-debt and co-signing" does not exist at all; as long as the loan is really used for the daily life or marital common production and operation, the debtor can prevent the target debt from being recognized as the personal debt of one of the husband and wife through the Purpose Theory. In addition, the "evident loss" in the Purpose Theory of English law, that is, the benefit standard, can also be compared with the benefit theory in Chinese law. Some judges believe that in the context of the application of the benefit theory to the debtor's spouse's property, civil subjects only bear civil liability within the scope of benefit, otherwise they are not responsible.[53] For example, if a husband and wife borrow money outside the daily family agency, the creditor cannot prove that the debt is used for the marital family life or common production and operation, but can prove that the non-debtor does benefit from the loan. Then, according to the value judgment of the Benefit Theory, the marital community debt can only somewhat benefit. The benefit standard in the UK belongs to a Consensual Approach, which is used to determine whether there is undue influence, and then to confirm that co-signing consensus is true and valid; the position of benefit standard in Chinese legal theory is parallel to the Consensual Approach, and it can only be applied if the marital community debt cannot be determined by consensus.

52 See Belinda Fehlberg, *Sexually Transmitted Debt, Surety Experience and English Law,* Clarendon Press, at 83-85 (1997).

53 See LI Changjun & WANG Qingfeng, 执行债务人配偶财产的法律思考 (Legal Thoughts on the Enforcement of the Debtor's Spouse Property), 4 法律适用 (*Journal of Law Application*), 75 (2013).

However, the relationship between Purpose Theory and Presumption Theory coincides with the position of the current law in China. Compared with the time-based presumption rule of marital community debt in Paragraph 1, Article 24 of Judicial Interpretation of Marriage Law (II), Article 3 of Judicial Interpretation of Marital Debt, confines it to being a proof tool under Utility Theory. As for the debts incurred by the husband or the wife beyond the "family daily needs," the non-debtor only needs to prove that the debts are beyond the "daily family needs," and such debts can be presumed to be the personal debts of the debtor, so that the non-debtor's personal property can be exempted from paying the debts, and unless the creditor can adduce evidence to the contrary the presumption would be upheld. In this way, the presumption has returned to the original position of "presumption" as the proof rule from the strong position that is enough to compete with the utility theory. The same is true of the status of presumption in English law, which can only exist as a way of proof and can never be the principle of identifying common debts.

As for the relationship between Consensual Approach and Presumption Theory, the positions of modern English law and the current Chinese law are generally consistent, and both attach importance to consensus as a yardstick in confirming the nature of marital debt. Such a relationship will not change because of the application of presumption as a method of proof. CIBC Mortgages plc v. Pitt overturned the undue influence ruling in BCCI v. Aboody case, which reflected the position that the joint and several marital debts must be based on the premise of consensual existence in English law. Although this position is not explicitly stated in the field of marital debt in China, the third paragraph of Article 178 of the Civil Code states: "Joint liability shall be stipulated by law or agreed by the parties." Based on the concept of systematic integration, applying the above general rules of joint and several liability to the special context of marital debt shows that unless there is a clear provision in the field of marital debt, if you want to identify the marital debt as joint and several debt in a certain situation, you must base it on consensus between the debtor and the non-debtor, rather than the rationality argument that "a certain debt should be identified as joint and several debt". The so-called consensus between the debtor and the non-debtor, whose core is the consent of the non-debtor to the debtor's personal name in which the husband or wife borrows money, is not limited in form, and can be either prior consent or subsequent consent.

D | Interpretation of Article 1064 of the Civil Code

Chinese scholars hold different opinions on the nature of three types of debts: debts incurred for the daily family needs, debts incurred for common life beyond the daily family needs, and debts incurred for common production and operation beyond

the daily family needs.[54] However, all theories have one evident thing in common, which is that some of the above three types of debts are either uniformly classified as joint and several debts or uniformly classified as community debts. However, this kind of Interpretation Theory does not conform to the coherence of the joint and several debt system. The correct approach should be that for any of these categories, "one size fits all" characterization should not be applied, but should adhere to the consent standards whereby if the borrower and the non-borrower reach a consent, it is a joint and several debt; if the borrower and the non-borrower do not consent with each other, even if the non-borrower knows and even benefits, it can only be counted as a community debt.

By interpreting Article 1064 of the Civil Code, five situations can be identified, and the nature of debt can be determined accordingly.

Case 1 (Consensual Approach): The debts that are co-signed by the husband and wife or subsequently ratified by either the husband or the wife are marital community debts, and the responsible property consists of three parts: the husband's personal property, the wife's personal property and the husband and wife's common property.

Case 2 (Consensual Approach +Purpose Theory): The debt incurred by either the husband or the wife for the daily family needs in his or her own name during the marriage. If the non-borrower consents that the borrower borrows money for both husband and wife in his or her own name, the debt is joint and several, and the responsible property is the same as case 1.

Case 3 (Purpose Theory): The debt incurred by one spouse for the daily family needs in his or her own name during the marriage. If the non-borrower does not consent the borrower to borrow money for both spouses in his or her own name, the debt is a marital community debt, and the responsible property is the borrower's personal property and the husband and wife's common property, excluding the non-borrower's personal property.[55] The reason for joint debt (Case 2) and joint debt (Case 3) for "the family daily needs" is the "marital joint debt" contained in Article 1064 of the Civil Code as a legal concept is a broad sense of joint debt, which also refers to the narrow sense of community

54 For the viewpoints of Articles 2 and Article 3 on the marital joint debt and the marital community debt, see WANG Yang, 夫妻债务的基本类型、责任基础与责任财产——最高人民法院《夫妻债务解释》实体法评析(Marital Debt's Basic Types, Responsibility Foundation and Responsibility Property—An Analysis on the Substantive Law of the Supreme People's Court's Interpretation of Marital Debt), 3 当代法学 (*Contemporary Law Review*), 57 (2019); ZHU Hu, 夫妻债务的具体类型和责任承担 (The Specific Types of Marital Debt and Their Responsibility), 5 法学评论 (*Law Review*), 58 (2019). For the opposite viewpoint, see the above two articles, which are considered referring to the marital community debts instead of the marital joint debts. See RAN Keping, 论夫妻共同债务的类型与清偿——兼析法释〔2018〕2 (On the Types and Liquidation of Marital Community Debts—Analysis of Law Interpretation [2018] No. 2), 6 法学 (*Law Science*), 71 (2018); XIA Jianghao, 论中国民法典夫妻共同债务界定与清偿规则之构建 (On the Definition of Marital Community Debts and the Construction of Liquidation Rules in Chinese Civil Code), 4 妇女研究论丛 (*Journal of Chinese Women's Studies*), 61 (2018).

55 For example, a man is financially poor, he would rather lower his consumption for maintaining personal dignity and consumption philosophy. However, his wife applies for a small consumer loan for their daily family needs. In this case, as long as he can prove these facts, such a debt can only be a community debt rather than a joint debt.

debt and joint debt. This assertion exists because the "marital community debt" in Article 1064 of the Civil Code cannot be understood as a narrow sense of community debt at all, otherwise it will lead to the absurd result that the "co-debt and co-signing" in the first paragraph of this article can only produce a narrow sense of community debt rather than joint debt. In addition, based on this assertion, one can see that although there is a legal fiction in the latter part of the first paragraph, "The debts incurred by a husband and wife in their personal names for the daily family needs during the marriage are marital community debts," the content of this legal fiction is not the consent of the non-debtor, but is based on the opposing interpretation of the original text—that the debts incurred by a husband and wife in their personal names for the daily family needs during the marriage are definitely not the personal debts of the debtor. As for whether the debt is a community or a joint debt, it is not what fiction is about, and it must be determined according to the existence or non-existence of the non-borrower's consent, that is, Case 2 and Case 3 here.

Case 4 (Purpose Theory+Presumption Theory): The debts incurred by either the husband or the wife in their personal name during the marriage beyond the daily family needs will be presumed to be the personal debts of the debtor, and the responsible property is the debtor's personal property and its corresponding share in the marital Common Property, excluding the non-debtor's personal property and its corresponding share in the marital Common Property. Certainly, this presumption can be overturned by evidence to the contrary; if the creditor proves with evidence that the debt is used for the husband and wife's common life and common production and operation, but it cannot be proved that the debt is based on the common will of both husband and wife, then the debt is a marital community debt, and the responsible property is the same as the Case 3. [56]

Case 5 (Consensual Approach+ Presumption Theory): The debts incurred by either the husband or the wife in their own names during the marriage that exceed the daily family needs will be presumed to be the personal debts of the borrower, which can be overturned with evidence to the contrary. If the creditor can prove with rebuttal evidence that the debt is based on the expression of the common will of both husband and wife, the debt is a marital joint debt, regardless of whether he or she also proves that the debt is used for the common life and common marital production and operation, and the liability property is the same as the Case 1.[57]

56 For example, if the non-borrower does not know about the spouse's borrowing behavior, or knows but does not consent to the borrowing, let alone effectively participate in the common production and operation, and only enjoys the dividend of the operation, then even if the borrowed money is used for the common production and operation, the debt can only be a community debt rather than a joint debt.

57 For example, if the non-borrower knows about the spouse's borrowing behavior and consents to the borrowing, or even effectively participates in the common production and operation, then the debt is a joint debt rather than a community debt.

IV Conclusion

With the full incorporation of the Judicial Interpretation of Marital Debt in Article 1064 of the Civil Code, compared with the rules of several years ago, the current legal rules of marital debt have generally approached the value consensus of Chinese people, but there is still room for detailed interpretation. The traditional mode, which is dominant in the Common Law System and does not adopt the Common Property system, has limited comparative significance at the conceptual level, but at the functional level, it has the following reference significance for the interpretation of the marital debt rules in the Civil Code era in China.

First, the agency of necessity, which was created in the era of marital personality integration, aims to support the wife and strengthen the marital community, and protects creditors only incidentally. The determination of the scope of responsibility under this system is similar in function to the determination of "the daily family needs" in China, and the separation of husband and wife should be considered in interpretation, as long as the debtor is not at fault for the reasons of separation. Whether a loan of a specific amount falls into this category should be based on the consumption level of a specific party during their living together, rather than referring to the general consumption standards of the same class or even the local area.

Second, there is no narrow sense of community debt in the mainstream mode of marital debt in the contemporary Common Law system, and the marital community debt is based on the consensus of the passive party to the debt behavior of the initiator. When determining whether the consensus is flawed, it mainly examines whether the passive party has been influenced by the actual or presumed undue influence from the debt initiator, and whether there is a reason for complement the consensus under the presumed undue influence; that is, whether or not the passive party really benefits from the marital common operation. Its interpretation significance to Chinese law is the nature of the two types of generalized community debts of husband and wife involved in Article 1064 of the Civil Code. No matter whether the debts are those incurred for the daily family needs, the debts incurred beyond the daily family needs but used for common life, or the debts incurred beyond the daily family needs but used for common production and operation, they should not be considered as joint debts or narrow joint debts. However, the consensual standard should be respected, that is, if the borrower and the non-borrower reach a consensus, at least the non-borrower must reach a consensus to borrow money for both husband and wife in the personal name of the couple, which is joint debt; if the borrower and the non-borrower do not reach a consensus, even if the non-borrower knows and even benefits, it can only be counted as a narrow sense of common debt.