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# Let Men Come Out Ahead: Property Division in China's Divorce Cases

XIN HE

Faculty of Law

The University of Hong Kong

In his seminal paper 'Why Do the Haves Come Out Ahead? Speculations on the Limits of Legal Change', Galanter argues that despite the institutional arrangements to guard against particularism, private power, and inequality, the 'haves' still come out ahead in the US court system.<sup>1</sup> Even if ideal legal arrangements—such as judicial independence, due process, ethical and competent judges, and so on—are in place, the 'haves' still come out ahead because the stronger party's advantages are inevitable.

Situating the discussion in the US context, Galanter assumes that the judges making the decisions are neutral. When his original thesis on resource disparity is tested in other countries, the assumption becomes unrealistic. For example, Haynie demonstrates that in the Philippines, the laws and policy may favor the 'have-nots' because social stability is an important concern;<sup>2</sup> Dotan argues that the Israeli High Court may have an ideological preference toward the 'have-nots'.<sup>3</sup> In other words, the laws reflecting state policies and the judges may be biased. A broader theory has been proposed by Wheeler et al.<sup>4</sup> and refined by He and Su.<sup>5</sup> They have suggested three sets of elements—relating to the law, the courts (judges), and the litigating parties' characteristics—to explain Galanter's proposition that the stronger party wins more often. The first set of elements suggests that there may be a normative tilt of the law toward, or against, the stronger party; the second proposes that the court itself, specifically the judges, may be biased; the third stipulates that the stronger party typically commands greater resources, has more experience, or is in a better strategic position.<sup>6</sup> Indeed, based on an empirical analysis of about 3,000 cases from Shanghai courts, He and Su find that 'in Chinese litigations, the impact of party resources deployable in the courtroom may only be the tip of the iceberg'. In some areas, the laws bluntly favor

<sup>1</sup> Galanter, M (1974) 'Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change' (9) *Law & Society Review* 95.

<sup>2</sup> Haynie, S (1994) 'Resource Inequalities and Litigation Outcomes in the Philippine Supreme Court' (56) *Journal of Politics* 752.

<sup>3</sup> Dotan, Y (1999) 'Resource Inequalities in Ideological Courts: The Case of the Israeli High Court of Justice' (33) *Law & Society Review* 1059.

<sup>4</sup> Wheeler, S, Cartwright, B, Kagan, R and Friedman, L (1987) 'Do the 'Haves' Come Out Ahead? Winning and Losing in State Supreme Court' (21) *Law & Society Review* 403.

<sup>5</sup> He, Xin and Su, Yang (2013) 'Do the "Haves" Come Out Ahead in Shanghai Courts?' (10) *Journal of Empirical Legal Studies* 120.

<sup>6</sup> Albiston, Catherine (1999) 'The Rule of Law and the Litigation Process: The Paradox of Losing by Sinning' 33 *Law & Society Review* 869.

the 'haves'. In others, the judges are influenced by the form of constraints on the behavior of the judges'.<sup>7</sup> Furthermore 'the judges' consideration of their own career and the larger political implications may have an impact on the litigation outcomes'.<sup>8</sup>

This may reflect how, during divorce litigation, common marital property is divided in China. Women's rights advocate and the lawyer Guo Jianmei commented of the famous divorce case of Li Yang, the founder of Crazy English, 'It's a huge flaw in the system. The state doesn't intervene to force rich men like Mr. Li to reveal their true assets, and it doesn't allow lawyers like us to do it either, it doesn't give us the rights. This is a society that doesn't control those with money or power. It doesn't see things through to the end.'<sup>9</sup>

When Chinese women face off against husbands in divorce litigation, they are the weaker party. For a long time and for various reasons, the earning capacity of women has been lower than that of men. Socialism has not liberated women in China (hereafter also PRC or People's Republic of China). PRC 'Chinese women endure educational, *economic*, political, and cultural inequities that are international features of women's secondary status' (emphasis added).<sup>10</sup> If the financial disparity between the genders was narrower during the first three decades of the People's Republic, after the marketization in the mid-1990s, women, particularly middle-aged women, became financially more vulnerable compared to their male peers. Until recently, they had been required to retire ten years earlier than men, and women were also more likely to be laid off or forced into early retirement during the wave of privatization. Furthermore, the earnings gap between husbands and wives in absolute terms has only increased.<sup>11</sup> Fincher points out that as far as gender wealth gap is concerned, the right place to focus on is residential property, and according to her, 'many Chinese women have been shut out of China's explosion of housing wealth because urban homes appreciating exponentially in value tend to be registered solely in the man's name'.<sup>12</sup> According to a survey she cited, only 30 percent of marital home deeds in the most expensive cities in China list the woman's name, whereas 70 percent of women contribute to the home purchase.<sup>13</sup> A legal consequence is that a woman faces a heavier burden of proof to show that she has equal shares in the communal property, even if her name is on the deed. In a famous case, the court awarded only 30 percent of the home value to an abused wife, even though she was the joint owner.<sup>14</sup>

How exactly do the judges divide property between men and women in divorce litigation? As will be shown, the legal stipulations favor men. Yet, I focus more on how the laws have been implemented than on how the laws should be revised. Can the existing promises of the laws protecting women's interests be fulfilled? Have the court practices exacerbated a situation where the laws are already unfair? I contend that throughout the proceedings, the judges' concerns for self-protection and efficiency have further

<sup>7</sup> He and Su 'Shanghai Courts' *supra* note 5 at 139.

<sup>8</sup> *Ibid.*

<sup>9</sup> Tatlow, DK (2013) 'China's Most-Watched Divorce Case, 3 Victories, 1 Defeat' *New York Times* February 5, available at <https://cn.nytimes.com/china/20130205/c05tatlow/en-us>.

<sup>10</sup> Stacey, J (1983) *Patriarchy and Socialist Revolution in China* University of California Press.

<sup>11</sup> Gilmartin, C; Hershatter, G; Rofel, L and White, T (eds) (1994) *Engendering China: Women, Culture, and the State* Harvard University Press; Shu, Xiaoling and Bian, Yanjie (2003) 'Market Transition and Gender Gap in Earnings in Urban China' (81) *Social Forces* 1107.

<sup>12</sup> Fincher, LH (2014) *Leftover Women: The Resurgence of Gender Inequality in China* Zed Books at 5.

<sup>13</sup> Fincher *Leftover Women* *supra* note 12 at 7-8.

<sup>14</sup> Fincher *Leftover Women* *supra* note 12 at 72.

disadvantaged women in property divisions. Women often have to give up their property rights in return for a divorce or child custody. Delaying an unavoidable divorce decision, and the bidding (*jingjia*) process for a wife who has no other place to live, contribute to women's distress. Additionally, judges are often indifferent to the generally substandard legal services women endure. The division of conjugal property illustrates how judges, under institutional constraints, have let the 'haves,' mostly men, come about ahead.

## PROPERTY DIVISION

Consistent with the state's policy orientation empowering citizens to dissolve unhappy marriages, property divisions have surfaced as a key issue for marriage and divorce during the reform period. A rather unique characteristic in China's divorce law is that there is no strict requirement of alimony or maintenance, either for or from either side. Article 42 states that at the time of divorce, if one party has difficulties supporting himself or herself, the other party must render appropriate help from her or his personal property such as the residence. Specific arrangements are to be made between both parties through consultation. This means that once the communal property is divided, the couple will no longer get any financial support from one another. This legal arrangement only intensifies the fight over property division, especially for the financially disadvantaged party. If he or she cannot get a better share at the time of settlement, that party may struggle financially after divorce.

While the 2001 landmark amendment to the Marriage Law makes divorce easier, it also clarifies that when dividing matrimonial property, the court is supposed to take good care of women and children. Article 39 stipulates that in cases where an agreement cannot be reached, the people's court is to make a judgment in consideration of the actual circumstance of the property and on the principle of caring for the rights and interests of the wife and children. It launches procedures that aim to recognize fault and provide compensation for blameworthy marital conduct.<sup>15</sup> It also introduces legal penalties by defining civil and criminal liabilities. Behaviors that justify divorce could entitle an innocent party to claim damages (Article 46). Further, by recognizing significant gaps between men's and women's financial standing and social status, the state acknowledges its obligation to protect women's rights in marital and familial conflicts.

Nonetheless, individual property rights have been strengthened. In contrast to Article 13 in the original 1980 Marriage Law (both spouses have equal rights to manage a couple's jointly owned property), Articles 18 and 19 of the 2001 Marriage Law define individual property within marriages and elaborate how prenuptials or other notarized agreements between spouses can designate legally enforceable claims. Accordingly, all property acquired before marriage is presumed to be individual, unless otherwise agreed upon, as is the case for all items that one party deems to be for his or her personal use. Article 19 stresses individual ownership in emphasizing how agreements to designate separate ownership are binding for both parties. This marks what Davis terms 'the turn away' from China's long-time advocacy and support for a conjugal property regime.<sup>16</sup>

<sup>15</sup> Palmer, Michael (2007) 'Transforming Family Law in Post-Deng China: Marriage, Divorce and Reproduction' (191) *China Quarterly* 675.

<sup>16</sup> Davis, Deborah (2014) 'Privatization of Marriage in Post-Socialist China' (40) *Modern China* 551 at 558.

This tendency has become clearer since then. For more than a decade, the Supreme People's Court (hereafter, SPC) has promoted property-related marital regulations. The SPC's first batch of Interpretations of the 2001 amended Marriage Law focused on property divisions more than any other issue. In 2003, the court promulgated the second batch of judicial Interpretations. Of the twenty-nine articles, twenty were property-related. Of significance was a provision that courts could not withhold divorce from the party at fault if affection had broken down. It specifies and supports individual property rights within a marriage but leaves protection of marital property vague. For example, Article 22 of the 2003 SPC Interpretation specifies that absent other arrangements, parents investment before a marriage should be seen as a gift to their child alone; investments after the couple are married are considered gifts to the couple. In contrast to the First and Second Interpretations,<sup>17</sup> the Third Interpretation, in 2011, undermines the latent protections of communal property. It privileges parents' investments in married children's residences if the parents had invested and registered the residence in their child's name before the marriage (Article 7). The Third Interpretation elaborates that in cases where parents of both the husband and the wife have invested in the purchase of the home, absent other arrangements, ownership will be apportioned on the basis of the parents' investment. An underlying theme in this process is separating affection from property.

Scholars have lambasted this position in the amended Marriage Law. In examining the 'disparate impact of some of the facially-neutral provisions', Ogletree and Alwis argue that the Marriage Law fails to address many problems in determining women's property ownership, both during the marriage and after divorce.<sup>18</sup> Because the law fails to 'account for the experience and values of women [...] the law may actually disadvantage women'.<sup>19</sup> The procedural weaknesses of the law, the wide discretion given to a poorly educated male judiciary often at the local level, and the difficulty in meeting the requirements of proof all undercut the ostensible gains women secured through the 2001 amendments. They also recognize that even when wives gain title to property, they lack the financial resources to realize their legal rights. In sum, Ogletree and Alwis find that 'equitable property distribution in the context of inequality between two parties does not produce equal results'.<sup>20</sup> In terms of protecting women's welfare, the revisions were mostly symbolic. Margaret Woo is less pessimistic.<sup>21</sup> She believes that the 2001 amendments redressed some of the disadvantages by clarifying the grounds for divorce, defining what constitutes conjugal property, and elaborating on child custody and visitation rights. She concludes that the 2001 revisions 'swing the pendulum back'<sup>22</sup> toward more collectivist arguments that ultimately may protect women's interests. However, she also finds that

<sup>17</sup> Supreme People's Court. 2001. The First Interpretation of the Supreme People's Court on Several Issues in the Application of Marriage Law of the People's Republic of China, Promulgated on December 25, 2001. Supreme People's Court (2003) The Second Interpretation of the Supreme People's Court on Several Issues in the Application of Marriage Law of the People's Republic of China, promulgated on December 4, 2003. Supreme People's Court. 2011. The Third Interpretation of the Supreme People's Court on Several Issues in the Application of Marriage Law of the People's Republic of China, Promulgated on August 9, 2011.

<sup>18</sup> Ogletree, C, and de Silva de Alwis, R (2004) 'The Recently Revised Marriage Law of China: The Promise and the Reality' (13) *Texas Journal of Women, Gender, and the Law* 251.

<sup>19</sup> Ogletree and de Silva de Alwis 'Revised Marriage Law' supra note 18 at 254.

<sup>20</sup> Ogletree and de Silva de Alwis 'Revised Marriage Law' supra note 18 at 281.

<sup>21</sup> Woo, Margaret (2003) 'Shaping Citizenship: Chinese Family Law and Women' (15) *Yale Journal of Law & Feminism* 99.

<sup>22</sup> Woo, Margaret (2003) 'Shaping Citizenship' supra note 21 at 133.

because women have fewer economic resources than men 'to make their stories heard'<sup>23</sup> in more evidentiary based judicial decisions, the new emphasis on contractual arguments and burden of proof disadvantages most women.

Scholars are even more critical of the SPC Interpretations on property division. They argue that under the Interpretations, only emotional issues are still covered by the Marriage Law and the courts; in terms of property, the SPC Guidelines look more like contract law. Davis argues that the 2011 SPC Interpretation turns away from established norms of the communal property regime, favoring formal over substantive equality.<sup>24</sup> The prenuptial arrangement has an important role in determining the division outcome should a divorce ensue. To Davis,<sup>25</sup> the logic of the voluntary contract has been extended to intimate relationships, and there is a trend toward the 'privatization of marriage.' Some Chinese scholars have even suggested that the Marriage Law has been changed into property law. They predict that the laws, when implemented, will lead to more gender inequality, and even revert back to the 'feudal' period.<sup>26</sup> Jiang even asserts that these SPC Guidelines will turn back the clock to when the stronger party (most likely the man) openly preyed on the weaker party (usually the woman) in property division. Protecting vulnerable parties in marital disputes has lost momentum; greater attention has been diverted to the personal freedom to dissolve unhappy marriages and the codification of individual property rights in the process of divorce settlement. The law and the judiciary thus recognize more of the individual property rights and are more attuned to citizens' property rights.

More clear is the changed orientation of the law; less known are the actual operations of the courts and their decisions' impact on the two genders. Most analyses have been based on the letter of the law; few have touched on the law in action. One exception may be Li and Friedman, who document the predicament of a rural woman who, after years in an unhappy marriage, was resolved to sue for divorce in court. They state, 'Preoccupied with its own priorities and interests, the grassroots courts system is insensitive to rural women's marital suffering and unsupportive of their pursuit of legally endowed rights upon divorce. Instead of following the law as it appears on the books, judges often cut corners, skip judgment on property division and conjugal 'fault,' and, in effect, reduce divorce litigation to merely a matter of marital dissolution'.<sup>27</sup> They contend that the judges also allow longstanding patrilineal values and property regimes, coupled with norms of patrilocal residence after marriage, to permeate their decision-making process. This exacerbates married women's inferior status within their conjugal communities and their weak claims to matrimonial property. Their examination of 171 divorce lawsuits suggests that rural women walk away from divorce litigation with no farmland, no housing, and no financial compensation, let alone alimony. Yet, their husbands often retain de facto or de jure control over family and conjugal property.

<sup>23</sup> Woo, Margaret (2003) 'Shaping Citizenship' supra note 21 at 132.

<sup>24</sup> Davis 'Privatization' supra note 16.

<sup>25</sup> Ibid.

<sup>26</sup> Jiang, Shigong (2011) 'Sifa nengdong xia de zhongguo jiating—cong zuigao fayuan guanyu hunyinfa de sifa jieshi tanqi' (Chinese Families in the Context of Judicial Activism—Starting with the Judicial Interpretations of Marriage Law by the Supreme Court) (2011, 1) *Wenhua zongheng* (Beijing Cultural Review) 24.

<sup>27</sup> Li, Ke, and Friedman, S (2016) 'Wedding Marriage to the Nation-State in Modern China: Legal Consequences for Divorce, Property, and Women's Rights' at 161, in Celello, K and Kholoussy, H (eds) *Domestic Tensions, National Anxieties: Global Perspectives on Marriage, Crisis, and Nation* Oxford University Press 147.

The other exception is the survey conducted by Chen et al.<sup>28</sup> They examine the outcomes of property divisions in 360 divorce cases sampled from three years in a Chongqing district. They find mixed results as to gender equality. Some suggest improvements, but many others aggravate inequality. For example, they find that in 34.8 percent of the cases men were assigned more communal property, whereas in only 16 percent of the cases did women get more.<sup>29</sup>

While these studies provide insight, many questions remain unanswered. On which aspects does the decision-making process become gendered? What are the judges' concerns on these issues? If the laws have already disadvantaged women, how have the judges, through their behavior, exacerbated the situation?

## WOMEN TRADING PROPERTY FOR CHILD CUSTODY AND DIVORCE

In Li's study on how legal workers—those who have some legal knowledge but without formal licenses to practice as lawyers—in rural Sichuan interact with their divorce clients, she finds that they often prod female clients to forgo their property rights.<sup>30</sup> She argues that this gendered pattern is derived from the institutional structure of the service fees collected by the legal workers: they usually charge a lump sum for a case, and thus they want to finish processing cases as soon as possible. While this explanation makes sense, questions remain: Why don't the legal workers press their male clients more? The following sections will show that this gendered pattern stems from the judges' approach: it is the judges who press females to give up their property. In many cases, the legal workers are simply conduits, relaying these pressures to their clients.

Because judges are unwilling to confront the stronger party, the weaker party's property rights are more dispensable. A pattern thus emerges: if one party wants a divorce or child custody, he or she has to sacrifice property rights. There is a trade-off between property and personal rights: in effect, one needs to pay for personal rights. A lawyer with twenty- years of legal practice experience in Shenzhen explained to me:

Whoever initiates the divorce process will get the short end of the stick. This is because the initiator is usually more eager to get divorced. The other party could take advantage of this and respond with a firm opposition, so as to force the initiator to compromise on other aspects such as property or child custody. If the initiator refuses to make concessions, the courts usually grant a divorce denial on the first petition. Then, the divorce decision will be delayed, imposing, at least, psychological pressures to the initiator. To get the divorce earlier, and to be freed from the marriage, many are willing to compromise, trading money for time.

In the Autistic Daughter's Case, one of the two daughters of the female defendant in a divorce litigation just started the primary school. She showed some symptoms of autistic and thus needed special care. The female defendant yearned for custody of her two daughters. In her own words, 'it would be great for them to grow up together'. She opposed divorce

<sup>28</sup> Chen, Wei; Zhang, Xin; and Shi, Lei (2018) 'Empirical Research on Protecting Women's Property Rights in Divorce Proceedings in China' (3) *International Journal of Law, Policy and the Family* 109.

<sup>29</sup> Chen, Zhang and Shi 'Protecting Women's Property Rights; supra note 28 at 112.

<sup>30</sup> Li, Ke (2016) 'Relational Embeddedness and Socially Motivated Case Screening in the Practice of Law in Rural China' (50) *Law & Society Review* 920.

in the first petition and was supported by the court. The man unsuccessfully attempted to reverse the decision on appeal. Six months later, he filed another petition. At that time, the couple had already been separated for two years. During the trial, both parties agreed to divorce but fought over other elements, including child custody and property. The seven witnesses summoned by the woman alone indicated the intensity of the fight.

As mentioned above, when a divorce case involves two children and both parties fight for child custody, courts usually offer each party one child. This may be the best way to show a judge's evenhandedness. In this case, of his several claims, the man had requested custody for one child, even though, because he was working for a remote production and construction corps in Xinjiang, he was not in a good position to raise her. However, the woman, for reasons which will be explained momentarily, wanted custody of both children despite being unemployed. The morning after the trial, the woman came to the judge:

I want both children. The property is far less important. I cannot separate the two. You know, how great would it be for them to grow up together! This is because my elder daughter has autism. Her nursery [school] teacher said that she always quietly stays in the corner, without talking to anybody. It is worrisome. A doctor later confirmed that it was autism, though not serious. She is getting better now, and she can go to school by herself. Now that I agree to a divorce, as I said in the trial, I want both children. He does not love the children; he only wants a share.

With such a significant compromise being proposed, the judge soon helped reach a deal: the woman gave up receiving support for one child, reimbursement for money borrowed (debts) for raising the children, and any appreciation in value of the conjugal apartment. The apartments' value had tripled from 3,400 yuan to 10,000 yuan per square meter since they had bought it. For the 120-square-meter apartment, she had lost 400,000 yuan, equivalent to ten years of her salary (3,000 yuan per month)! She would live with the two children in a suburban apartment originally owned by her parents.

This is the tradeoff that the woman had to accept. The family had two children, a result of the relaxed birth-control policy effective since 2015. As mentioned, the courts' usual practice is to allocate one child to each side. To achieve a result diverging from this usual practice, significant concessions are necessary. The woman had originally wanted a divorce, child custody, and property: she had summoned seven witnesses to support her positions. She opposed the divorce on the first petition, trying to offer the kids a seemingly intact home. However, to secure custody of both daughters, instead of just one, she had to forfeit her property rights. The woman's desire to gain custody of the two children put her in a disadvantaged negotiating position. She said to the judge: 'I can give up everything as long as I have the two children with me.' Her daughter's autism seemed to be the key to her decision.

Similarly, when the divorce itself is in dispute, women often have to forgo property rights to obtain their own freedom. In a case in which the defendant was a policeman, he behaved strategically to extract more financial benefit by claiming child custody. When his wife filed the divorce petitions, she sought child custody, payback of a 20,000-yuan debt, and division of the marital property. In particular, she insisted that the husband repay 20,000 yuan borrowed from her parents. At the pretrial interview, when the policeman was not yet represented by a lawyer, he had been amenable to the divorce and repayment of the debt. In the pretrial mediation, the woman, assuming both parties had agreed to

divorce, insisted on child custody and the property rights. Thus, she had successfully resisted the judge's pressure regarding child custody.

In the trial, the policeman behaved more strategically, and the original dynamics changed. He opposed the divorce and sought child custody. Moreover, he denied the debt's existence and fought over every item of property, from bride-price to baby formula. Taken aback, panicking, and nervous, the woman did not know how to respond. She now had to fight for the divorce and child custody, two items that she had earlier taken for granted. She almost forgot the issue of property division. Realizing how poor her performance had been during the trial, the day after she took the initiative to approach the judge despite their unpleasant pretrial mediation session. This time, she made it clear to the judge that all she wanted was a divorce and child custody. She was ready to give up the communal properties and forfeit the 20,000-yuan debt. Still uncomfortable, she asked her relative, a prosecutor who knew the judge well, to act as a go-between.<sup>31</sup>

With this U-turn in the wife's position, it became an easy case for the judge, who had always been focused on how to end cases peacefully and efficiently. In the judgment, the judge did not even bother to mention all the small electronics that should have belonged to the woman, who already felt grateful for being awarded the divorce and child custody. The judge later told me that had the wife taken this position in the pretrial mediation session, then the case would have been settled quickly.

In this case, the woman had been more eager to get rid of the man than vice versa. Her original positions for the property during the mediation had been based on the assumption that the man would be willing to divorce and give up child custody. Her bottom line, however, was revealed once the divorce and child custody were contested. Then, the only bargaining chip she had was the property. That was why she eventually made significant compromises on this matter

This rationale seems equally applicable to both genders, but why are females' property rights more slighted? First, women are both financial and physically weaker within Chinese society and thus easier to persuade. Second, mothers spend more time with their children and thus have a closer link, as shown in the Autistic Daughter's Case. To get child custody they may have to forgo property rights. Finally, it is women, not men, who initiate the majority of divorce lawsuits.<sup>32</sup> If she is the initiator of a divorce, the woman often has a strong desire to leave the marriage behind. This consideration is subjective, dependent on individual preferences and values, and thus cannot be quantified in monetary terms. Nonetheless, the woman is often more eager to dissolve the current marriage and move on. Often, she is also more willing to compromise. When the man is more resistant to divorce, the judge will press the woman on other issues. That is why it is women who disproportionately bear the brunt of the problem. The gendered pattern creeps into property division.

<sup>31</sup> On 'connections' or *guanxi*'s impact on judicial decision-making, see He Xin and Kwai Hang Ng (2017) ' "It Has to Be Rock Hard!" *Guanxi* and Judicial Decision Making in China' (65) *American Journal of Comparative Law* 341.

<sup>32</sup> Xu, Anqi (2007) 'Lihun yu nüxing diwei ji quanyi zhi tantao (A Discussion of Divorce, Women's Status, and Rights)' (2007, 1) *Zhejiang xuekan (Zhejiang Journal)* 198; Chen, Zhang and Shi 'Protecting Women's Property Rights; supra note 28; Wang, Xiaoling (2007). 'Chongchu weicheng: M fayuan lihun anjian diaocha baogao (An Investigation Report on the Divorce Cases in Court M)' *Sifa (Justice)* at 201; Li, Ke (2015) ' "What He Did Was Lawful": Divorce Litigation and Gender Inequality in China' (37) *Law & Policy* 153 at 175 footnote 7.

## DISPARATE IMPACTS OF DELAYED DECISIONS

As I demonstrated elsewhere, delaying divorce decisions has become routine for both first-time petitions as well as those intensely contested.<sup>33</sup> This is done to address the courts' concerns over efficiency and stability. This section of the essay explores the financial impacts of these approaches. It contends that a delayed decision often disadvantages women in terms of property division. One common exit strategy for divorcing couples is to transfer their communal property.<sup>34</sup> But a delayed court decision paves the way for men—usually the holders of conjugal property and in a financially superior position—to hide, transfer, or squander the property. When the divorce is finally granted, there is little property left for the woman. The man may have experienced a change of heart due to the protracted battle and accumulated resentment. He therefore is more likely to wage a full-scale war and refuse to compromise. In other words, the bureaucratic and political concerns exacerbate women's already inferior position in terms of property rights.

This pattern is exemplified in cases that are initiated by men but resisted by women. As I showed elsewhere, in this type of case men usually have developed a new romance or have become economically superior.<sup>35</sup> For those who are eager to leave the marriage behind, they could compromise on the property division. However, when their requests are persistently denied, their counterstrategies are to transfer, hide, or squander the communal property. They may simply go ahead and start a new life without finalizing the divorce, since they cannot get it from the courts anyway. A denial decision from the court, ostensibly supporting the requests of the woman, actually places her in an irreversibly miserable situation. This deals another blow to her already disadvantaged position.

In a Shaanxi case, the wife had become distraught after prolonged battles in divorce litigation (the Distraught Woman's Case). The husband, a construction contractor, had become involved in a new romance and sued to divorce his wife, who was a housewife. According to the woman, the man had committed domestic violence against her. More unbearable for the woman, the man's new love kept texting indecent, insulting, and humiliating messages to her. With his new love, the man, after moving out of the original apartment, had vandalized the defendant's home. Insulted, the woman vehemently opposed the divorce. In her own words, she would not let go of such a scoundrel. The law should be on her side.

It seemed that the man had made a fortune by taking subcontracted projects in Beijing. However, the woman knew nothing about the details of these assets. It was from her brother, who worked for the man's company as a driver, that she learned about the man's fortune. Regardless, this had not been her focus; she argued that she still loved him, and they were raising their daughter tighter, a legal ground that their mutual affection had yet to break down. The man, then, perhaps eager for an expedited divorce, or out of guilt or sympathy, proposed to compensate the defendant 50,000 yuan. Of course, there was room for negotiation if the woman was willing to go that route. Determined to oppose the divorce, the woman ignored the offer.

<sup>33</sup> He, Xin (2009) 'Routinization of Divorce Law Practice in China: Institutional Constraints' Influence on Judicial Behavior' (23) *International Journal of Law, Policy and the Family* 83.

<sup>34</sup> See, for example, Fincher *Leftover Women* supra note 12 at 150.

<sup>35</sup> He, Xin (2017) ' "No Malicious Incidents": The Concern for Stability in China's Divorce Law Practice' (26) *Social & Legal Studies* 467.

Because of the defendant's stance against divorce, and because it was a first-time petition, the judge, a man in his forties, was unwilling to waste time (as he saw the matter) on mediation. He soon took the best strategy: an adjudicated denial. The law seemed to be on the woman's side.

Six months later, the man initiated a second petition for divorce. This time the woman's position had changed. While she still opposed the divorce, she was willing to negotiate financial compensation. She even provided two bank accounts under the man's name and 5,000 yuan in cash for the court to conduct an investigation, hoping that the court could uncover the profits from his projects. This indicated that she was ready for divorce should the husband's earnings be found and their matrimonial property be equally divided. After all, by then the couple had been separated for almost two years. The man, during the trial, also admitted that he had 150,000 yuan in savings. The outcome hinged on the amount of compensation.

While the woman provided two bank accounts under the man's name, it was the judge's job to identify the conjugal property. This time, the case was in the hands of a different judge. This judge, in his fifties and near retirement, was not in good health and had been known for not making too much effort in handling cases. He only perfunctorily checked the two accounts provided by the woman and found no money. Apparently, the money earned by the man during the marriage had been transferred or hidden in an unknown account. Since the woman's expectations for compensation had been high and the man was defensive, the conflict between them was hard to reconcile. When the two parties could not reach an agreement on monetary compensation, the judge rendered another adjudicated denial. As the subsequent developments would reveal, a decision seemingly fulfilling the wife's requests had in fact been nothing less than a steep blow to her prospects for a favourable outcome.

After being rejected twice by the courts, the man gave up requesting a divorce through the court. It seemed that the woman had won the legal battles because the courts had supported her requests. However, she got nothing more than a marriage in name only. The man never returned home. Instead, he lived with his new lover in a location unknown to the defendant. Rumors suggested that they had even had a child.<sup>36</sup> The man fulfilled none of his responsibilities as a husband. The court seemed to side with the woman, but the judicial decisions earned her little material benefit. The adjudicated denials seemed to identify the couple's problems yet provided no solutions. They were akin to a medical report that detected the cause of a disease but failed to identify a cure. Eventually, the man's strategy of was effective. Four years after the second petition, the woman, realizing that a divorce denial decision did no good for her, initiated a petition as plaintiff. The woman, tortured by the experience, became distraught. Easily agitated, she could not even focus when communicating with others. At the time she filed the petition, she had been working as a part-time security guard in a college dorm and was barely supporting herself.

Six years had passed since the man initiated his first divorce petition. When they met for the third trial, little mutual affection remained between the two. The man's position was clear: he agreed to divorce, but he had no savings left and could not compensate

<sup>36</sup> According to the law, this might constitute bigamy, which would offer the wife leverage: to prosecute the man criminally. With rumors only, however, she might not be able to locate where the man and his new lover lived. Neither the court nor the police would have any incentive to initiate this.

the woman for any cause. He also insisted on custody of their fifteen-year-old daughter because the wife, given her mental status and job security, was unfit for guardianship.

This time, the judge was a recent graduate with a master's degree from a prestigious law school. From a well-off family, he did not need the job to support himself, and he had little aspiration to be promoted. His work attitude was not much better than those of his predecessors. Since both parties agreed to divorce, the judge focused on child custody and property division. As the only conjugal property that the wife had proven was the apartment bought for 40,500 yuan seven years earlier, the judge divided it in half according to the SPC Guidelines. The husband bid 100,000 yuan, higher than the wife's offer. As a result, the husband received ownership of the apartment. The wife received half of the bidding price—50,000 yuan—and moved out of the apartment. The judge also awarded custody of their daughter to the man due to the wife's unstable mental condition and insecure employment status.

This marathon of a divorce fight finally came to an end. The wife had won some early battles but lost the war. The two delayed decisions on divorce—two adjudicated denials—seemed to support the claims of the wife. In reality, however, they had cost her the best opportunity for better financial compensation. If an adjudicated denial was an obvious choice and a routine practice for the first petition, the second adjudicated denial had been financially disastrous for the woman. The man had been a contractor of his own transportation business. He was the business's operator, but the woman knew nothing about its operations, let alone its profits. Thus, the man easily transferred the profits to unknown accounts.

It was difficult, if not impossible, for the woman to prove the existence of those assets. If the first denial offered an opportunity for the couple to recover, the second denial was completely unnecessary. The man was already cohabitating with another woman, and he never came home. The only communication between the nominal husband and wife were the insults hurled at one another. How could such a marriage be rescued by an adjudicated denial? After that legal encounter, the man felt that the woman had intentionally blocked his request for a divorce. So he simply gave up pursuing a divorce in the courts. He opted for cohabitation with his new love, a common phenomenon in China today. At that point, his original sympathy, and feelings of guilt toward his wife vaporized. That was why he had taken a firmer stance in the third trial. In the division of the conjugal apartment, he went for a higher bid, squeezing the woman out of her accommodation.

The judges understood that the collapse of such a marriage was inevitable. After the divorce, the man would move on with the new love, perhaps with the daughter from the previous marriage; the woman would live in a small rental apartment, employed or unemployed, at least temporarily. The judges of the first two petitions nonetheless chose adjudicated denial to end the cases. This was also the best way to protect themselves. The judge in the third trial simply granted the divorce and divided the property following routine practice.

This case is not unique. As documented elsewhere, judges facing such cases may explain the consequences to the bereaved wife, but they do this primarily to facilitate a settlement. He and Ng demonstrated how a judge, through pragmatic discourse, urged a wife to accept a divorce settlement when the husband was still in a position to offer some

financial compensation.<sup>37</sup> She stated that ‘once the husband’s heart was not in the family anymore, what is the difference to be with and without a husband?’ The judge had wanted to bring about a settled outcome, which would have been consistent with her own interests. However, her advice was also important for the estranged wife: she might be financially better off by accepting a divorce and settlement. Further delays would only cost her, without offering any bargaining leverage, eventually sinking her into financial distress. Indeed, in the *Distraught Woman’s Case* above, the judge in charge of the first petition had also attempted to mediate. However, that effort had been more than enough to pacify the irritated wife. The judge abandoned any mediation and rendered an adjudicated denial. A fundamental question is: when women raise requests that may eventually hurt their own interests, do judges lend them a hand? These cases each demonstrate that due to efficiency concerns, the judges have little incentive to help out impoverished women.

Of course, in cases in which men oppose the divorce, similar consequences exist. However, men enjoy advantaged financial status and earnings power compared to women. The impact of such a decision pattern will be less destructive for men than for women. Most men are in a position to control the family’s finances and thus avoid losing financial control to a wealthy wife. A report by Peking University’s Women’s Rights Research Center states: ‘Despite the facially neutral safeguards in the law, in reality, women have little knowledge of what property is actually owned and have little recourse to tracing property when it is illegally transferred to a third party by a spouse’.<sup>38</sup> Ogletree and Alwis stress that ‘the challenges surrounding providing ownership or concealment of property constitute an insurmountable burden to women in China’.<sup>39</sup> While the law provides that neither side can transfer property without the other party’s consent, women are often unable to gather real evidence on property transfers or to compel witnesses to testify to the existence of concealed property. They may be unaware of the full extent of the property; even if they do know of it, they are rarely able to provide proof. If the plight of women is rooted in procedural laws that require litigants to provide evidence, the judges’ approach to divorce cases only makes matters worse. As the *Distraught Woman’s Case* shows, the court’s strategy of delay provides an opportunity for men to conceal and transfer property. A delayed decision, or an adjudicated denial, offers a safe haven for the judge. The consequence for women, however, is the loss of her last opportunity for compensation. For example, in her second legal battle against her husband, the distraught woman provided 5,000 yuan for investigation fees. Yet, she got nothing in return, partially due to the judge’s laziness and incompetence. However, a divorce denial is not the trademark of only those judges who are ill-suited for the job; it is shared by *most* judges due to the courts’ incentive mechanisms.

## INDIFFERENCE TO SUBSTANDARD LEGAL SERVICES

The importance of legal representation in China’s litigation system has been demonstrated by scholars.<sup>40</sup> Indeed, whether or not a party obtains legal representation is a key indication

<sup>37</sup> He, Xin and Ng, Kwai Hang (2013b) ‘Pragmatic Discourse and Gender Inequality in China’ (47) *Law & Society Review* 279.

<sup>38</sup> As quoted in Ogletree and de Silva de Alwis ‘Revised Marriage Law’ supra note 18 at 261.

<sup>39</sup> Ogletree and de Silva de Alwis ‘Revised Marriage Law’ supra note 18 at 262.

<sup>40</sup> He and Su ‘Shanghai Courts’ supra note 5; Xiong, Moulin; Liu, Siyu and Liang, Bin (2018) ‘Criminal Defense

of resource equality: inferior financial capability often means inferior legal representation, in terms of both availability and quality.<sup>41</sup> In the context of divorce litigation, no hard statistics for legal representation are available. However, given the financial disparities between men and women, and the access barriers women face,<sup>42</sup> women likely enjoy fewer and less competent legal services. However, a more relevant question for our purposes is: When women's lawyers or legal representatives provide unprofessional advice, sometimes detrimental to their interests, or when women suffer from a lack of legal representation, do the judges help?

To answer this question, one should look again at the judges' incentives when facing unprofessional legal representation in the courtroom. As long as efficiency and stability concerns are addressed, why should judges care?

Indifference is also the reaction pattern when judges notice substandard legal services for women. In the *Distraught Woman's Case*, the woman had no legal representation during the first two trials (other than her uncle, a retired official). On the third trial, when she had made up her mind to divorce, she hired a citizen legal representative;<sup>43</sup> she could not afford a professional lawyer. With the help of these amateur representatives, she made six requests in her filing statement:

First, divorce from the defendant; second, 100,000 yuan for emotional injuries due to the indecent text messages and other faults committed during the marriage; third, 50,000 yuan for property damages for vandalizing the plaintiff's home by the defendant and his lover; fourth, the division of the conjugal apartment; fifth, custody of their daughter; and finally, the litigation fees born by the defendant alone.

To a trained eye, this was an unprofessional statement. The claim number three sought compensation from the man's lover, a third party to the litigation who lacks privity. Since this was not allowed under the procedural laws, the woman dropped the claim upon the suggestion of staff at the case filing division. This, however, was not necessary. Had she received more professional advice, she could have simply crossed out the lover's name. In that case, she would have kept the claim and might have received some compensation for it. Number two looked just but was unrealistic. The courts have varying criteria on issues of emotional damages, but the amount awarded is connected to local living conditions and any award is generally meager. According to the guidelines and practices of local courts, the maximum emotional compensation for a wrongful death was 20,000 yuan at the time; how could 100,000 yuan be a realistic claim for insulting language? Exaggerating claims is also common among inexperienced lawyers and legal workers. They mistakenly believe that the more claimed, the better. Any hyperbolic claims, however, only mean more litigation fees. The distraught woman's last point, on litigation fees, though commonly raised in commercial lawsuits, was also ludicrous in divorce litigation: the courts rarely hold one party solely responsible for all litigation fees.

and Judicial Sentencing in China's Death Penalty Cases' (24) *Psychology, Crime & Law* 414.

<sup>41</sup> He and Su 'Shanghai Courts' supra note 5.

<sup>42</sup> Li, Ke 'What He Did Was Lawful' supra note 32.

<sup>43</sup> For more on citizen legal representatives in China, see Li, Ke 'What He Did Was Lawful' supra note 32, and Liu, Sida (2008) *Shiluo de chengbang: dangdai zhongguo falü zhiye bianqian* (*The Lost Polis: Transformation of the Legal Profession in Contemporary China*) Peking University Press.

Most importantly, the dispute over property division was supposed to focus on the bottom line of the man's company, yet the woman had not claimed this. It was during the trial that she presented a contract for a project, trying to prove the existence of the husband's earnings. However, the court is bureaucratic: it does not make judgments on claims unstated in the filing statement. When a plaintiff falls short of staking out specific claims on marital property, the court avoids any ruling on such matters.<sup>44</sup> To add more claims, a litigant has to go through another round of the case filing procedure, which usually means more litigation fees. Indeed, it was common for unprofessional legal workers to advise their clients to make new claims during the trial, hoping the issues could be adjudicated without paying the litigation fees. This advice is popular among clients because it seems to save them litigation fees. However, the courts rarely delve into these added claims. An exceptionally responsible judge might make further efforts—perhaps explaining the court's requirements and investigating hidden or transferred properties—but most of the rank and file never bother.<sup>45</sup> That was what had happened in this case. The young judge from a well-off background made no efforts in this regard. He merely ensured that the procedures followed were consistent with the law. The final judgment stated that the claim was rejected due to a lack of evidence, a vague statement common in China's civil judgments.

Indeed, the woman's uncle and her legal representative during the third litigation had not been competent enough to locate the assets accumulated by the man. During the second litigation, providing two bank accounts and expecting the courts to conduct a thorough investigation had been idealistic during a time when judges were facing heavy caseloads.<sup>46</sup> According to Ng and He, judges only occasionally conduct investigations, usually after the litigants or their legal representatives have paved the way.<sup>47</sup> If the legal representatives cannot do most of the preparatory work in locating evidence, it is unrealistic to expect much from the judge.

If this is the situation for adjudicated cases, indifference is even more pronounced in mediated cases. The preference for mediation trumps women's interests. As documented by Ng and He (2014), a judge may even suppress the lawyer from performing his duties if that helps achieve a mediated settlement. Li and Friedman (2016: 161) state:

Judges in charge of divorce lawsuits frequently circumvent adjudication and resort to mediation, a shortcut that protects them from challenges to their rulings by litigants or other state agencies. During the mediation sessions, judges rarely pushed for equitable division of property between spouses. Instead, they tend to persuade and even pressure the wife to relinquish her claims to conjugal property in hopes that such a compromise would facilitate subsequent negotiations with the husband. To expedite divorce settlements, some judges went as far as to encourage the wife to buy off her husband, leading to even more unequal litigation outcomes. Although in this situation a wife might successfully secure her husband's agreement

<sup>44</sup> Li, Ke 'What He Did Was Lawful' supra note 32 at 171-172.

<sup>45</sup> He Xin and Ng, Kwai Hang (2013a) 'Inquisitorial Adjudication and Institutional Constraints in China's Civil Justice' (35) *Law & Policy* 290.

<sup>46</sup> Woo, Margaret, and Wang, Yaxin (2005) 'Civil Justice in China: An Empirical Study of Courts in Three Provinces' (53) *American Journal of Comparative Law* 911.

<sup>47</sup> Ng, Kwai Hang and He Xin (2017) *Embedded Courts: Judicial Decision Making in China* Cambridge University Press.

to the divorce, she did so at the cost of relinquishing her claims to conjugal property while also paying out a significant amount of cash.<sup>48</sup>

Echoing the existing literature, the following case shows the judge's approach to a bride-price dispute, a frequent occurrence in rural China. A man had filed for divorce because the woman had 'refused to live with him' Both parties agreed to divorce, and the remaining issue was the bride-price, a common practice in rural China in which the phenomenon 'more men than women' is pronounced (the Bride-price Case). The man's family had paid 130,000 yuan as the bride-price, a large sum of money for the family. At trial, the woman admitted the fact that bride-price of this amount had been paid, but said she had no money to repay it. Note that she did not say she would not pay, but 'she had no money to repay'. It was possible that the bride price was paid to her natal family, rather than to herself, so she herself would not be in a position to make such a return. Or simply the bride price had been spent. A formal Interpretation by the SPC (2003, Article 10)<sup>49</sup> stipulates that the bride-price must be returned if the couple never lived together. However, this law did not apply to this case because the couple had lived together, though only for several days. Then the judge turned to the legal worker hired by the woman for an opinion. A professional lawyer would have responded with a clear-cut 'no,' because the law does not apply to this situation. Instead, the legal worker responded that 'they can return some of the bride-price, but the amount should be determined by the judge'. From this response, the judge saw an opportunity for mediation. He summoned a lay assessor for help. The assessor, a retired village official in his seventies, understood what the judge wanted. He said to the woman, her legal representative, and her natal family members that 'this might have constituted marital fraud. If so, it would be a criminal case instead of a civil one. Then, the situation would be far more complicated than returning the bride-price: the whole family might be incriminated. You'd better return the bride-price! Next time I will find you another man, and will get a larger amount of bride-price'. The legal worker, wearing an uneasy smile when passing another cigarette to the lay assessor, said that these comments made sense. Simultaneously scared and enticed by the lay assessor's statement, the woman's side immediately agreed to settle. Consistent with the findings of He the lay assessor served as an instrument of the judge in facilitating mediation.<sup>50</sup> The judge, of course, was pleased with the assessor's performance, since the latter disposed of the case by mediation. The result, however, was that the woman 'agreed' to pay back all the bride-price, despite the law saying otherwise.

### LOSING THROUGH BIDDING

For most urban families, the most important asset is their apartment, which is usually co-owned by the couple. Thus, the apartment's division often is the only issue when awarding property. Article 20 of the SPC's second Interpretation on the Revised Marriage Law states that when a couple cannot agree upon their apartment's ownership and value, the court is to allow a bidding process in order to make a determination. This stipulation has invited much criticism because it assumes equal bargaining power between men and women. On

<sup>48</sup> Li, Ke and Friedman 'Wedding Marriage' supra note 27 at 161.

<sup>49</sup> Supreme People's Court 'The Second Interpretation' 2003 supra note 17.

<sup>50</sup> He, Xin (2016) 'Double Whammy: Lay Assessors as Lackeys in Chinese Courts.' 50 *Law & Society Review* 733.

the Interpretation's promulgation, Zhao asserts that the party with less cash flow would not be able to outbid the other party and thus would suffer.<sup>51</sup> Ogletree and Alwis predict: 'Women usually do not have the money to reimburse husbands, so the house automatically goes to him. Even though Article 42 of the Revised Marriage Law states that a party who is having problems subsisting at the time of divorce should be helped by the other party, this provision, without any corresponding enforcement mechanism, remains merely symbolic and an attempt to inculcate moral values'.<sup>52</sup>

What I will demonstrate, however, is that in reality the courts not only 'allow the usage of bidding when the couple cannot agree upon the apartment's ownership and value' as the SPC Interpretation stipulates; they also push for its usage regardless of an unfavorable outcome for the financially weaker party. Between the lines, the SPC Interpretation suggests that bidding is not the only way to determine ownership. As long as a party objects to such a mechanism, judges can and should arrange an alternative, most likely a market appraisal. Due to efficiency concerns, however, in more than thirty trials involving apartment division that I observed, the bidding process was adopted. Indeed, all my judge interviewees confirmed its widespread usage. The judges stressed the efficiency of determining an apartment's value through bidding. Market appraisals, the alternative to bidding, could cost as much as 10,000 yuan for one apartment, depending on the local costs of living. Few litigants want to pay for this. With the judges' emphasis on the cost, eventually all litigants followed their advice, and in most situations the man secures ownership with the higher bid. What the judges do not mention is that a successful bid by two parties would save the judge a lot of time and procedural hassles. An appraisal could take three to five months to complete. No wonder judges are fans of the bidding process. It simplifies their job. However, this convenience incurs expenses, usually borne by women, the financially weaker party in the divorce process.

This is exactly what had happened in the *Distraught Woman's Case*. As only a part-time security guard, and after six years of divorce battles, the woman was so distraught that she was unable to carry on a meaningful conversation; she was not in any position to compete with the man in the bidding process. Her own survival depended on her natal family. How could she have enough cash to outbid the husband? At trial, as the judge recalled, she could not even focus her attention, and many of her answers did not make sense. In contrast, the man controlled a transportation company, and along with his resentment toward the woman he had all the will and financial resources to outbid her, thus kicking her out of the apartment, her only shelter. In the trial, the man was candid in his contempt toward the woman, behaving as if she did not exist. Before the bidding started, the outcome had already been determined.

Under the guidance of the judge, they quickly agreed to adopt a bidding process to determine the value and ownership of their apartment. The judge started from 50,000 yuan and asked the parties to bid: whoever bid the highest price would get the apartment. When the defendant bid 100,000 yuan, the distraught woman could not raise further, so the value was established. The defendant got ownership; half of the bidding price—50,000 yuan—was to be paid to the plaintiff. The market price of the apartment was around 130,000

<sup>51</sup> Zhao, Xiaoli (2011) 'Zhongguo jiating ziben zhuyi hua de haojiao' (The Horn of the Capitalization of Chinese Families) (2011, 1) *Wenhua zongheng* (*Beijing Cultural Review*) 31.

<sup>52</sup> Ogletree and de Silva de Alwis 'Revised Marriage Law' supra note 18 at 266.

yuan. The gap between the market price and the lower (bidding) price stemmed from two reasons: in the bidding process there were only two bidders, whereas in a competitive market there could have been numerous offers. Thus, the weaker party could not afford to bid the market price. As a result, the party who loses ownership, usually the woman with less cash on hand, suffers from the bidding process.

In another Shaanxi case, the husband, a driving coach, sued to divorce his wife in her mid-fifties, a laid-off worker from a state-owned enterprise. To pay for their daughter's education, she had bought out (*maiduan*) her job at the state owned enterprise for 20,000 yuan ten years before. The consequence of the buyout was that she had lost all her pension. Now she was working ten hours a day for a supermarket, earning 1,800 yuan per month. The couple had a small apartment, the family's only major asset. The husband had moved out a year before. According to the woman, he was in a new relationship and was already cohabitating with his lover. Nonetheless, the wife opposed the divorce. She said that he would return home once he had fooled around enough. She would keep waiting. Presenting the man's receipts for medicine and a cell phone, she, without legal representation, wanted to prove that they did and could live together. With a lawyer behind him (again, resource disparity), the man suggested dividing the apartment through bidding. He was honest enough to admit that he had 20,000 yuan in his stock brokerage account.

The woman was lucky enough to have a sympathetic judge, a middle-aged woman. The judge did not give the man an opportunity to bid for the apartment because she knew that it was this woman's only lifeline. Instead, she denied the divorce, fulfilling the woman's request (and simultaneously addressing efficiency concerns). The judge later told me that she hoped the marriage could last until the daughter got married; then she would have new hope in life (also addressing the judge's stability concerns). However, it was expected that the man would soon initiate another divorce petition. At that point a divorce, and the bidding process, would be inevitable. The woman would likely lose the apartment, since she could not pay the man such a considerable amount of cash. It was probable that she, with half of the bidding price, would move out of her current home and rent a smaller apartment for the rest of her life.

Few judges are that sympathetic. For most divorce litigants, trials are traumatic, a marked date on their life calendars. For the judges, however, it is just another day of business. Most judges in charge of family issues have seen too many divorce cases and broken families. They just want to dispose of the cases, as long as their efficiency and stability concerns are addressed. What they have shown is what Weber (1954) has called 'institutional apathy'.<sup>53</sup> Whether such a practice would do harm to the female is beyond their concerns. As one judge said, 'It is the woman who has to figure out what to do.' As 'rank and file' judges, their role is similar to that of most bureaucrats: to fulfill the job requirements.

Such a gendered outcome may not have been intended by the SPC, whose goal is to provide a convenient solution to dividing conjugal apartments. Regardless, men's financial status is inevitably superior, and this puts them at an advantage. Once women lose the bidding, they lose their home. Gone are the conveniences of their original apartment: a familiar living environment, easy access to schools and hospitals, a sense of belonging to the community, and social connections.

<sup>53</sup> Weber, Max (1954) *Law in Economy and Society* (ed. Max Rheinstein) Harvard University Press.

Making matters worse, judges' concerns exacerbate the situation. The SPC Interpretation II (Art. 20) specifies that undertaking a bidding process is conditioned on the consent of both parties. Yet in reality, it operates as if there were no such condition. Whenever both litigating parties claim ownership, the judges push them to adopt bidding. This seems to be the only lawful and efficient way to fix the value and determine ownership of conjugal property. Any party who opposes the process appears to be giving the judges a hard time.

## CONCLUSIONS

As far as the law is concerned, the issues of divorce, property division, and child custody are independent of one another. Each issue has its own governing principles and rules. Divorce is determined by whether or not mutual affection has broken down. Child custody is determined by the best interests of the children. According to the law, the decision on one issue should not affect the other, even though procedurally, only by granting the divorce question would the judge determine division of property and child custody. From a judge's perspective, however, these three issues are interwoven. When a party initiates a divorce petition, he or she often requests one or more of the three. Most divorce cases involve more than one issue, and the judge has to weigh all of these elements in the decision. Whether one agrees to be divorced, for example, may depend on how the other two issues are resolved. For a judge, these are three bargaining chips that can be employed to negotiate with the litigating parties. When the issue of divorce is contested, the other two bargaining chips become useful. If one party is steadfast on child custody, for instance, he or she will then have to compromise on divorce or property rights. Thus, what appear in the formal law to be separate decision-making processes are in the realities closely related and, in many cases, fused.

I demonstrate that under institutional constraints, Chinese judges adopt approaches that are harmful to women's property interests throughout the divorce process. The existing literature is correct in identifying that the changed legislative orientation disadvantages women in terms of property division. To achieve gender equality, laws require revision. Conjugal property should also include intellectual property, honors, or other intangible property, to provide some examples.<sup>54</sup> Yet, judges' concerns have aggravated the situation. To end a case efficiently without lingering effects, women have to forgo their property rights, usually their only bargaining chip, in exchange for either divorce or child custody. A delayed decision for inevitable divorces, a seemingly neutral approach, disadvantages women more than men. Due to the gendered financial disparity, women lose in the bidding process for the conjugal apartment. Judges are also indifferent toward the substandard legal services that are detrimental to women's interests. These factors each indicate that in addition to the unfair legal stipulations, institutional constraints have further perpetuated gendered outcomes.

<sup>54</sup> Su Li (1999) 'Lengyan kan hunyin' (A Calm View on Marriage) in Li Yinhe and Yinan Ma (eds) *Hunyinfaxiugai lunzheng* (*The Debate on Revising the Marriage Law*) Guangming Daily Press 34

GLOSSARY OF CHINESE TERMS

<b>Romanization (Hanyu Pinyin)</b>	<b>Chinese Characters</b>	<b>English Translation</b>
<i>guanxi</i>	关系	social connections
<i>maiduan</i>	买断	buyout
<i>Jingjia</i>	竞价	bidding