

'No Malicious Incidents': The Concern for Stability in China's Divorce Law Practice

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journals.sagepub.com/home/sls**Xin He***City University of Hong Kong, Hong Kong***Abstract**

Based on participant observation and in-depth interviews with judges, this article demonstrates the significant role of concern for social stability in China's divorce law practice in highly contested and potentially explosive cases. This is evident in the current use of mediation procedures. Since the judge is held responsible for keeping the parties in check, the concern for social stability dominates proceedings. The legal criterion of 'the breakdown of mutual affection' is eclipsed by the political principle of 'no malicious incidents'. This emphasis on maintaining stability, however, paradoxically reproduces social instability because it incentivizes violence in the domestic sphere. It also reinforces gender inequality. This study suggests the need to reflect upon the appropriate role of the judiciary in divorce proceedings and the tenuous boundary between law and politics in contemporary China.

Keywords

China, divorce cases, social stability

Introduction

If the court renders me a divorce decision, I will cut off her feet so that she will never leave me...Once this civil case is closed, the court will get a criminal one.

– a husband refusing to be divorced.

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I suffered from insomnia because of this case...I am exhausted. I don't want to be a frontline judge anymore...I cannot take it. If I continue to do this, my life expectancy will be shortened.

– a middle-aged judge.

Exploring the role of politics in judicial decision-making has been a tradition in law and society studies (Baum, 2006; Friedman, 2009; Ginsburg and Moustafa, 2008; Hilbink, 2007; Moustafa, 2014; Popova, 2006; Shapiro, 1981; Toharia, 1975). Indeed, few scholars lose sight of the ongoing interest of politicians in the Chinese legal system. Social stability, understood as the political and social security that accompanies orderly, conflict-free social relations, has recently topped the priority list of the Chinese regime (Trevaskes et al., 2014: 1–3; Wang and Minzner, 2015). Many studies have examined its role in reframing approaches to law and justice. Liebman (2011) argues that China has witnessed a populist return, overreacting to this concern for social stability. Focusing on the revival of mediation, Minzner (2011) claims that China has experienced 'a return against law', in which harmonious social outcomes are prioritized over just legal outcomes obtained through due process. Su and He (2010) and Chen and Xu (2012) explore how concern for social stability has reshaped the processing of labour disputes. Finally, an entire book has been devoted to examining 'the nexus between law, politics, and stability' in China (Trevaskes et al., 2014).

Yet rarely has the stability concern been addressed in studies of divorce cases. Based on participant observation and in-depth interviews with judges, this article will demonstrate the significant role that social stability plays in highly contested divorce proceedings in contemporary China. In these cases, social stability has come to inform and decisively shape procedures and outcomes. Since the number of malicious incidents (恶性事件) – the reification of social instability – now has become a dominant criterion assessing judges' performance, judges have a strong incentive to keep the parties 'in check'. As a result of this policy change, divorce law practice today departs from the traditional mode in which few divorces were allowed. Traditionally, judges preached socialist ideologies and sought to restore amicable relations between unhappy spouses. By contrast, the current goal of mediation is to prevent malicious incidents. To achieve this outcome, judges employ different tactics that go beyond their traditional approaches. They are now forced to assess the likelihood of the litigants causing social disorder. In particular, for cases threatening social stability, the legal criterion of 'the breakdown of mutual affection' is marginalized. It is in part replaced by the political principle of 'no malicious incidents'.

The Concern for Social Stability in Divorce Cases

Social stability has become a top national concern of Chinese authorities and, for them, law is essential to achieving and maintaining that stability:

[i]n official circles, social stability is understood as the political and social security that accompanies orderly, conflict-free social relations. Instability is manifest in what the Party

deems unharmonious relations within communities and between individuals and the state, brought by crime, dispute, and protest. (Trevaskes et al., 2014: 1)

Social stability has become a defining social–political goal as protest and dispute over socially sensitive issues such as land, labour and environmental protection are seen to threaten, not only the success of China’s economic agenda but also the nation’s political life and the Party’s future. How local courts and governments marshal the forces of law to resolve disputes and manage protest thus has emerged as a central political issue for China’s authorities.

In the regime’s thinking, one of the most serious incidents affecting social stability is the loss of life (Cai, 2008; Chen, 2008; O’Brien and Li, 2006). This is partly because a death may trigger collective action protesting the behaviour of the government as well as petitions for justice to upper level governmental authorities. Protest is informed by a desire to hold officials responsible and encompasses a demand for economic compensation and even political concessions. According to a recent study, China is most concerned with social events that have the potential for escalation into mass incidents (King et al., 2013). To maintain social stability, a national policy stipulates that the number of malicious incidents and petitions forms the basis for assessing the performance of Chinese officials. In particular, an unexpected death may terminate a local official’s political career. Not surprisingly, those officials are desperate to avoid malicious incidents, especially those involving loss of life.

Judges are subject to similar performance appraisals and pressures (Minzner, 2009; Wang and Minzner, 2015). In 2002, the Supreme People’s Court (SPC) instructed all courts across the country to focus on resolving complaints raised in petitions, ordering that these complaints should be treated as of equal importance to court trials (Liebman, 2011: 295). The SPC also instructed lower courts to carefully deal with petitions arising out of the litigation process, to persuade and guide petitioners and to rectify those judgements in which they had erred. The SPC itself has as many as 80 judges working on petitions (Liebman, 2011: 295). As a result, some courts set ‘zero petition’ targets. In fact, the number of malicious incidents has become a major criterion in assessing the performance of judges, for which they are held personally accountable (cf. PanyuCourt, 2004).

Family and marriage cases are the largest genre of first instance cases in the Chinese courts.¹ These seemingly mundane cases have frequently led to unexpected incidents. A divorce decision usually reshapes emotional and property relationships. For the parties, it will be an emotionally charged turning point in their lives. At stake are their life achievements: children, families and property. For some, the maintenance of marriage and family is all-consuming; for others, the thought of another minute with the other party under the same roof is suffocating and unbearable. Realizing the importance of stability concerns for courts, some litigants strategically behave confrontationally, irrationally, agitated and violent, in order to gain an advantage. Extreme reactions include suicide attempts, harassment and physical harm against the other party as well as their relatives, and even against their own children. Frustrated litigants who blame the presiding judge may also afflict personal injuries on them. In the eyes of the state, such incidents involving death or personal injury are ‘malicious’ (恶性). The problem has

become so serious that the SPC (2011) has issued a notice regarding 'the Prevention of Malicious Incidents in Divorce Cases'. The SPC 2012 Annual Work Report stated that the courts should 'take vigilant measures against those vengeful litigants and those uncontrollable conflicts, to prevent them from being agitated, escalated into malicious incidents, or transformed into criminal offenses'. This guidance from the SPC indicates the seriousness of the perceived problem.

While only a tiny proportion of divorce cases turn into malicious incidents or petitions, a single such incident has major consequences for a judge. The concern thus dominates how cases are handled. According to one judge, 'a judge's career would be ruined if a death resulted from her case. With such a terrible social effect, she is regarded incompetent for this job since she could not handle her litigants'. In this sense, divorce law practice not only exemplifies China's civil justice but it also evinces the broader relationship between state, law and society. It thus provides an aperture on how deeply the state has penetrated into what might be thought to be a 'private' area of social life.

Data and Methods

This analysis is primarily based on data collected in fieldwork investigations at a district court in Shaanxi province, Western China. This county has made little economic progress in the period since the reforms that began in the 1980s. Although the regional economy did grow during the initial years of reform, it has stagnated since the 1990s. By 2012, the GDP per capita had reached only around 5200 yuan (China Statistical Yearbook, 2013). Agriculture is the major industry due to both the fertile valleys formed by the Yellow River and a climate congenial to wheat cultivation. Nonetheless, population mobility has increased significantly. In 2012, the court received roughly 300 divorce cases, constituting 28% of its docket.

Studying divorce practices in Chinese courts presents tremendous methodological challenges. While divorce is generally viewed as mundane and as not raising issues of political sensitivity, judges remain wary of any enquiry from researchers based outside of mainland China. They are reluctant to share their thoughts, especially with regard to cases that may lead to petitioning or incidents threatening social stability. That is also why the existing literature primarily relies on archives, reported data and news reports.

To overcome these methodological challenges, I adopted unconventional methods. My data collection mainly consists of two elements. The first part is participant observation. As a visiting professor at a law school in China, I have been invited since 2012 to instruct the research department of a Shaanxi court on how to conduct empirical studies. Through this role, I have gained the trust of many judges. In 2013, I visited the court for 1 month, conducting a series of fieldwork investigations. During my stay, I stressed that the research was completely anonymous in order to relieve the concerns of the interviewees and thus help ensure the authenticity of the data. By gaining the trust of the judges, I was allowed to work in their offices during hearings and mediation procedures. They were also assured that my purpose was limited to academic study. In total, I observed the processing of 23 trials. For those cases in which mediation procedures extended beyond the duration of my visit, I called the judges afterwards for updates on

developments. Because the recording of court proceedings is not permitted in China, I relied mostly on my written notes.

According to Chinese procedural law, cases are either decided by the Normal Procedure (普通程序) (which involves a panel usually composed of three persons with one judge and two lay assessors) or by the Summary Procedure (简易程序) (with only one adjudicating judge deciding). In a panel trial, in practice, there is always a designated responsible judge, while the function of the others on the panel is largely symbolic. The responsible judge, or the adjudicating judge when the summary procedure is employed, is the one who is actually in charge. He or she is the person who presides over the trial and steers the case to a settlement or eventually delivers a judgement. Most of the family and divorce cases I observed were handled through the Summary Procedure by one judge sitting alone.

Formally, there are thus four stages in the Chinese court hearing process: court investigation, court discussion, court mediation and the announcement of the decision. During the court investigations and court discussions stages, the litigating parties may cross-examine each other. It is in the court mediation stage that the judge interacts with the parties and, in most cases, persuades them to settle. Depending on the case, a judge may conduct either a brief or a more thorough mediation process. The announcement of the decision, if any, usually takes place on another date, after the formal hearing has taken place. If the parties reach a settlement, the case does not proceed to a judicial decision.

For the highly contested cases that I observed, however, these four stages were not followed strictly. In particular, pretrial mediation dominated the entire process. Judges often conducted informal (and tedious) mediation, days or months before the formal hearing began. Only once the parties had clearly determined that they would not settle would the date for the formal hearing be set. Mediation efforts included telephoning the parties as well as summoning them to the office for private caucusing. In some cases, the judge even approached the relatives of the litigants in order to understand the two sides of the dispute. Even after the formal hearing had begun, the judge would still make efforts to mediate. Owing to the pretrial and in-court attempts at mediation, the processing of a case may last months, if not years.

The second aspect of data collection consisted of interviews with the presiding judges. As mentioned earlier, usually only one judge heard a case. After each session, I asked the judge how they viewed the litigants and how they would resolve their conflicts. Specifically, I enquired how the judge detected those potential litigants who might take extreme actions, how they prevented conflicts from escalating and how they dealt with obstinate litigants. I also asked about the pressures, challenges and difficulties judges faced in adjudicating this type of case, and what general strategies they employed. Finally, I asked about typical cases that had been resolved. Each interview lasted between half an hour and two hours, and most of them were conducted privately in the judge's office. Due to the high level of trust I had gained, I found that they were candid in answering my questions.

My field site was located in Western China, a region with distinctive socioeconomic and demographic characteristics. Therefore, I made efforts to verify whether the operational pattern identified in this court was regionally unique, or whether it was in wider

use across the country. To accomplish this, I interviewed by telephone a number of judges with experience in divorce cases from the provinces of Jiangsu, Guangxi and Hunan. Each of these interviews lasted between half an hour and an hour. The 32 resulting interviews are coded in the format of 'IS1401': 'I' refers to interview; 'S' represents the province (i.e. Shaanxi) in which the interview was conducted; '14' is the year of the interview; and '01' is the interview number for that particular province. Similarly, my written notes from participant observation are coded in the format of 'NS1301', with 'N' representing 'notes' and 'S' representing the province. Names and other identifiers have been changed to protect the identities of the litigants and counsel involved.

Taken together, these empirical findings allowed me to understand the judges' concerns in handling highly contested cases with political implications. Despite its limitations, the data is valuable, considering the paucity of sociolegal research on Chinese divorce law practice.

Traditional Mediation and Its Development

For many years, it has been difficult to get divorced in China. An underlying reason for this was the state policy under the socialist marriage system, which decreed that divorce was to be avoided if at all possible (Parish and Whyte, 1978: 194; Tsui, 2001). This pattern was reinforced when the policy coincided with the state-centred industrialization plan and the Cultural Revolution (Diamant 2000; Johnson 1983; Tsui, 2001: 106).

Until the 1990s, therefore, the priority of courts was to achieve a reconciliation between the parties. To achieve this, they frequently insisted on pretrial mediation in divorce cases. According to Parish and Whyte (1978: 193),

official policy requires prolonged mediation, even when both parties agree to divorce. For a minor dispute mediation is informal, involving neighbors, relatives, and friends. If the dispute becomes serious, more formal mediation begins. Because of a prolonged series of attempts at mediation at various levels, a divorce application might be delayed for months or years, even if the couple agreed on this matter.

If pretrial mediation failed, and court proceedings commenced, the court would usually attempt to restore an amicable relationship between the estranged spouses. In this way, the pressure put on couples by the courts was considerable, and many couples agreed to be reconciled at this stage of the proceedings. However, failure to reconcile would lead to further attempts at conciliation. Only if both of these types of judicial mediation failed would the court allow proceedings to be concluded by adjudication. The sole ground for divorce was a 'complete breakdown of mutual affection', and many judges interpreted this in a restrictive fashion (Palmer, 1989: 169).

According to Huang (2010), before the 1990s, divorce petitions that finally reached the courts were mostly mediated. Alternatively, spouses were pressured to reconcile before a final decision was made. Judges, as agents of the state, assumed the responsibility of rectifying 'mistakes' that had been made by estranged husbands and wives (Huang, 2010). This 'Ma Xiwu style of adjudication' (Liebman, 2011; Zhang, 1983) is

characterized by roving tribunals and courts held ‘on the spot’ in rural communities as a means by which to obtain local knowledge about a dispute. Judges would first conduct an on-site investigation into the cause of a deteriorating relationship and then attempt to ‘reform’ the couple through ideological education. In a ceremonial setting in which all relevant parties were present, the judge would employ ideological indoctrination to criticize and educate the couple. The familial, community and official pressures marshaled through the courts, together with material inducement, were almost impossible for divorce petitioners to resist. More often than not, they had to confess their ‘mistakes’ and ‘naiveties’ and reach a so-called reconciliation (Huang, 2010). This pattern is consistent with the current trend in divorce cases. With the exception of the early 1950s, the divorce rate in China, until recently, has been low (Tsui, 2001). In sum, getting a divorce before the 1990s was difficult, as illustrated in *Waiting*, the popular novel by Ha (1999).

The courts have taken a more liberal position (Li and Ma, 1999) since the SPC (1989) issued its ‘14 Opinions on How to Apply the Principle of “the breakdown of mutual affection”’. During the 1990s, divorce became central to a series of unprecedented public debates (Li and Ma, 1999). Old practices were criticized for allowing too much state paternalism and too little individual freedom and choice (Alford and Shen, 2003). Liberals argued that divorce could be desirable in some situations, freeing unhappy partners from unfortunate unions and sparing their children the prospect of growing up in acrimonious households (Li, 1998; Pan, 1999; Xu, 1999). While the new Marriage Law (2001) has mitigated against this liberal tendency, the courts have generally adopted a no-fault rule: as long as one party is persistent in seeking a divorce, he or she will get it, regardless of whether that party has been found at fault (Huang, 2010: 204–208).

Article 32 of the amended 2000 Marriage Law, the law governing whether a divorce shall be granted, still stipulates breakdown of the relationship as the leading legal principle. It also provides a non-exhaustive list of scenarios that would warrant a divorce: bigamy, cohabitation, domestic violence, deserting family members, chronic bad habits such as gambling and drug addiction and separation for 2 years. Procedurally, each side can file a divorce petition at the court directly without getting the consent of their work units. However, the judge is still required to conduct mediation before issuing a divorce, which is the third stage in the trial procedure.

While the court procedure for divorce has not changed significantly under the new law, the means by which mediation is conducted has altered significantly. In most cases, pretrial mediation has vanished. Court proceedings commence upon the request of the divorce petitioner. In-court mediation could not be sustained because the courts found themselves flooded by skyrocketing caseloads. For the same reason, judges rarely conduct on-site investigations today (Fu and Cullen, 2011). Furthermore, the structural conditions upon which the original mode of mediation relied – cooperative government officials, limited social mobility and the dominance of socialist ideology – no longer exist (He, 2009). Court decisions now are based largely, if not solely, on evidence provided by the parties and the examination of witnesses conducted during the proceedings (He and Ng, 2013a; Woo and Wang, 2005). The strict application of these rules of evidence has resulted in several unreasonable decisions (Huang, 2010). Even though mediation remains a compulsory stage in divorce proceedings, it has become a procedural formality: the judge briefly asks whether the parties are willing to mediate, before

moving on to adjudicate. The root cause of the desire to divorce, by and large, is no longer of concern (He, 2009). Judges rarely delve into the personal details of the couple's relationship. Instead, their focus is on gathering information to enable their judgements. Indeed, many parties reluctantly accept a mediated result simply when it becomes apparent that the court is about to deny a divorce. He (2009: 83) suggests that, in this way, divorce cases have become routinized: '[f]or first-time petitions, judges routinely render against divorce. But for second-time petitions, they routinely render adjudicated divorce'.

New Wine in Old Bottles: Mediation in the Shadow of Social Stability

Although He's (2009) account remains broadly true, it fails to acknowledge the concern for stability in divorce proceedings. As will be shown, judges invest tremendous amounts of time and energy into highly contested cases where stability is threatened, and the characterization of divorce as 'routinized' is inadequate to capture this dynamic. For those cases with clear and present threats to social stability, the judge's first task is to determine whether the situation might escalate into malicious incidents. While the concern for social stability has never appeared explicitly in the Marriage Law, it nevertheless has pushed the Chinese courts to respond through innovate means. What has emerged is a mediation process that on the surface looks similar to its traditional form. However, the goals, discourses, procedures and outcomes have shifted significantly.

Shifting From Reasons to Impact

The judge's first task in mediation is to interview the parties. But rather than simply the determination of the reasons behind the desire for divorce, today the judge needs to examine a party's mental states in order to assess their potential reactions if the court were to rule against them. Thus, instead of trying to understand the underlying cause of the deteriorating relationship, the judge will consider whether the litigants are mentally stable, whether they could peacefully accept a decision against their interests and whether they have the potential to react explosively. This has become the measure of success in mediation. Only if a judge effectively assesses the parties' mental state can she propose a solution acceptable to both parties and minimize the potential for malicious incidents.

In one case in which I watched both the hearing and mediation sessions, the wife, a doctor in her mid-30s, sought a divorce. She was emotional when talking to the judges, and during both the trial and the mediation process, never looked at her husband nor did she speak to him (NS1301). The husband was determined to prevent the divorce. During the court proceedings, he shocked me by uttering the words quoted at the beginning of this article: 'I will cut off her feet if she divorces me.' For the judges, the two parties appeared to be deadlocked. The wife might commit suicide if her petition was denied, but the threats of the husband were realistic as well. After several interviews with both parties, the judges were still unsure as to how to resolve the matter.

In another case, the wife, a salesperson in her late 40s, rushed to the court President's office as a result of the court's delay in handling her petition (IS1303). The judge had proceeded cautiously, interviewing the couple separately before scheduling a formal trial. The wife was seeking a divorce on the grounds of incompatible personalities and due to the fact that her husband did not assist with their son. It was apparent from the interview, however, that the judge was not convinced that her version was the full story. The real reason for the petition, the judge believed, was that the wife was involved in a new relationship. This was never admitted by the wife nor did the judge attempt to verify the theory. Throughout the interviews, the wife cried and threatened to commit suicide. From the wife's body language, and from the way she interacted with others, however, it appeared that she was determined, open-minded and optimistic.

According to the judge, the husband's situation was different. In his early 50s, he never mentioned why his wife was seeking a divorce, even though he was in the best position to know. According to the judge (IS1303), it seemed that the husband had something to hide. He struggled to cope with the divorce process and avoided discussing details of the marriage. The judge speculated that this might have been due to his eagerness to defend his dignity as a man. He might also have hoped that his wife would change her mind. Moreover, he maintained only a tenuous relationship with their son. He was having employment difficulties and was in a financially precarious situation. In short, losing this marriage meant a lot to him.

Despite the wife's threat to commit suicide, the judge believed she would accept a denial decision without making a fuss. This was for two reasons: first, she understood that so long as she kept filing divorce petitions, eventually she would be granted a divorce; second, her life was full of hope because she was expecting her new relationship to develop. However, psychologically the husband was in a dangerous situation. Even though he never uttered any threatening words, he may well have prepared a series of reprisal activities. He had intentionally hidden his real thoughts from the judge and his life was abysmal. Given these assessments, the judge persuaded the wife to withdraw her petition. With another opportunity, the husband would realize that the court had 'granted him face', helping him to overcome the animosity he felt towards his wife (IS1303).

Political Indoctrination Versus Pragmatic Persuasion

'Preaching' is a key component in mediation once the interviews are finished. In the Maoist version, judges often in 'educating' the divorcing couple through preaching to them. The goal was to persuade both parties to reconcile and rescue the marriage. The discourses employed by judges were political and therapeutic. For instance, they would criticize a party who was lazy or who had engaged in extramarital affairs, accusing them of bourgeois ideas. In the current form of mediation, by contrast, the purpose of the preaching is to resolve disputes for more pragmatic reasons. As pointed out by He and Ng (2013), the dominant discourse in today's mediation has switched to 'pragmatic discourse':

the judge seems to assume the role of a helping professional. But rather than fixing a broken relationship, her ultimate goal is to resolve the dispute. A judge does not address who is

wrong and who is right or what is reprehensible and what is laudable. (He and Ng, 2013b: 282).

This change is most obvious in divorce cases that threaten social stability. As mentioned previously, a concern of the judge is to ensure that both parties accept the court's decision rather than publicly reacting. Accordingly, judges need to find a peaceful way to end either the marriage or the proceedings. In a mediation session in which I was present, the judge said to the wife:

I know you are determined to get a divorce. But you face a lot of problems that cannot be solved even if the court grants you a divorce. For example, your personal safety, the telephone harassment faced by your parents, and the nuisance your husband creates at your new work unit. You have to find time and patience to talk to him. Instead of crying, explain to him earnestly why you are leaving him. (NS1303)

The judge thus advocated more communication. The underlying goal, however, was to let the husband know the reasons why his wife was seeking a divorce. The judge explained to me that there were two reasons for his pragmatic approach. First, understanding the reasons why she was determined to get a divorce was crucial in order to enable the man to accept the end of his marriage. Second, and more important, only when the husband understood the underlying reasons could he realize that simply saying 'no' would be insufficient to maintain the marriage. For the judge, the optimal result would be if the two parties could solve their problems by communicating with each other.

After several rounds of private caucusing and direct communication between the parties, it became clear that the wife was determined to end the marriage. But the judge still tried to persuade her otherwise:

Divorce cannot solve all your problems. Even if you get a divorce this time, he may still harass you and even hurt you. Why don't you try to stay with him for some time? You are already in your 40s, and it is hard to get remarried. More importantly, there will be conflict no matter with whom you live. By getting a divorce, you may avoid one conflict, but another conflict may creep into your life. That is just what life is meant to be. (NS1303)

At first glance, this appears to be a therapeutic discourse aimed at repairing the relationship (Merry, 1990). However, the underlying point was that getting a divorce would not help her situation. Moreover, since the judge's primary goal was to end the suit peacefully, whether or not the couple reconciled was of secondary importance. As a consequence, her discourse was not primarily therapeutic. This became apparent when she spoke to the husband privately a few minutes later:

I really hope you two can reconcile and get back together. But given her developments, and based on your understanding of her over the past two decades, is that possible? Indeed, you understand this better than I do: a marriage means the combination of two hearts and this has to be one's voluntary choice. It is said that a marriage is the business of two persons, but divorce is the business of one. She no longer wants to stay with you. How can you attach her to you? (NS1303)

In this moment, the judge tried to convince the husband that the marriage was over. By giving such different messages to the husband and wife, even the judge herself admitted that she could be accused of being 'two faced'. Once again, whether or not the marriage would fall apart was no longer the judge's primary concern. Instead, her ultimate aim was to let the parties appreciate their own problems as well as the judge's efforts. If they realized that further resistance was fruitless, they would be more likely to peacefully accept the court's decision. Furthermore, by placing herself in the shoes of the parties and searching for solutions for them, the judge demonstrated that she had already tried her best to help. In this way, the judge hoped, she had prevented either or both of them from blaming her and becoming hostile.

By employing this pragmatic discourse, the judge successfully persuaded the wife to withdraw her divorce petition. The outcome was acceptable to both parties because it simply postponed resolution. Obviously their mutual affection had broken down. The judge nonetheless considered the outcome an achievement: the couple accepted the arrangement and both social stability and her own safety had been preserved.

Delaying Decision: Divorce Blocking Versus Conflict Containment

If preaching does not work, the next tactic is to delay a decision. Traditionally, in divorce proceedings, this tactic was widely employed. As Palmer (1989: 169) notes, '[p]rolonged court mediation has served as an effective mechanism for *blocking contested divorce applications*, especially those in which the petitioner is a woman' (emphasis added). But in today's practice, the purpose of denying a divorce is to contain existing conflicts. The denial decision offers hope, albeit slight, to the defendant that the marriage may still be rescued. For those plaintiffs who have extramarital affairs, a denial decision conveys the message that the court supports the defendant. After all, a divorce is usually contested because the party being divorced does not accept the other party's leaving. However, in this situation, a cooling-off period may be valuable. For example, the defendant's emotional suffering may be alleviated given the additional time to calm down and being to move on. By contrast, if the court renders an immediate divorce decision, despite the protest of one party, it may aggravate a conflict further. Moreover, the protesting defendant may blame the judges, which needs to be avoided.

In one case, in which the wife sued for divorce for the first time, the real cause seemed to be that her husband was impotent sexually (although the court never verified this) (NS1321). According to the wife, the couple fought over trivial issues almost every night, and the wife's genitals had been physically harmed. This appeared to be a straightforward case until the judge learned that the husband's family was impoverished, with a disabled brother and a mentally ill mother. With little deliberation, the judge ruled against the wife in her first petition. She explained her decision in her office to the wife's lawyer (I was the only other person present):

No way will this marriage persist, but this time they cannot get a divorce. We must respect the husband's last dignity. Even though his request has little legal basis, at this moment we cannot wipe out the hope of his whole family. We have to maintain the form of this

marriage. This is to give the husband's family some time, to be psychologically prepared to lose this woman. (NS1321)

By contrast, the judge told me that a plaintiff expecting a divorce must leave with hope. For them, a delayed decision is acceptable because waiting for another 6 months is not unimaginable. On the basis of this rationale, a divorce could be delayed by the court, even if several previous petitions had been filed.

In one case, in which the wife sought a divorce because her husband beat her and her family, the judge told me that the two families fought against each other during the first court hearing. During the second hearing, the husband was agitated and claimed that he would die at the judge's home should a divorce decision be rendered. Unsurprisingly, the court denied the divorce. Six months later, when the wife filed another petition for divorce, the husband beat the wife again. He was then taken into custody but was released 3 days later. His refusal to eat or drink while in detention frightened the authorities responsible for him. It was said (although never verified) that the wife had aborted their child without his consent. Once again, the judge dared not grant the divorce because of the unstable psychological state of the husband. When the wife's mother, through her connections, asked a veteran judge why there was still no divorce after the petition had been filed five times, the judge responded indirectly: 'you had better find ways to compensate the other side and then try to get a settlement'(IS1315).

In a case from Guangdong, the wife had suffered from domestic violence at the hands of her husband for 18 years and they had been separated for 6 years, yet the court dismissed her divorce request twice. A judge explained to me that this was because the presiding judge had been threatened by the husband (IG1301). In another case, a battered woman from Jiangsu committed suicide after her divorce petition was rejected for a third time. This was her final protest against both her husband and the court (IJ1302). As documented by He (2009: 102), some judges 'would never grant a divorce if the defendant is suicidal or homicidal, no matter how many times the plaintiff might file a divorce petition'. This is because, as one of my informants explained, 'for one percent of recklessness, we will be held one hundred percent responsible'. A judge with 20 years experience in civil cases and educated to masters degree level described:

Handling this type of divorce case is not a test of a judge's ability to master the law or to apply the law. It is more of a test of a judge's holistic ability to solve problems. In this process, I did not consider whether 'the mutual affection still exists' as provided in the law. My standard is to avoid the malicious consequences that might result from a divorce decision. I would not approve the divorce petition even if 'the mutual affection between the couple had already been broken down'. (IS1304)

Finding Solutions Versus Avoiding Responsibility

When delay fails to resolve the case, reporting to the adjudication committee becomes the next tactic. The purpose of adjudication committees is to decide difficult, significant or sensitive cases. Their members are experienced bureaucrats who are alert to political concerns and the social impact of disputes (a subject on which junior judges may lack

experience). Although the scope of ‘difficult, significant or sensitive’ is difficult to determine, it is rare for divorce cases to be placed on an adjudication committee’s agenda. Historically, under the approach adopted in Maoist mediation, cases were reported to the committees primarily as a means to find solutions to rescue a marriage. For example, the committee might be in a better position to coordinate with the government and obtain resources for a family in need (Huang, 2010). By contrast, in the current mode of mediation, a case is reported to the committee when malicious incidents are likely to occur. Submitting a case to the committee is the means by which the responsible judges ensure that the senior court officials take the responsibility for making a decision, even though the committee may be no better placed to do so. But once a case is decided upon by the committee, the responsibility for the decision is no longer located in any individual (He, 2012). Instead, there can be said to be collective responsibility for the court’s decision. As He describes (2012: 693):

A wife filed a petition for divorce, but her husband contested it. The marriage had been extremely tense. The wife had left home and the husband had searched for her throughout the city. As a result of this broken relationship, he became mentally unstable. While the wife insisted on a divorce (死也要离), the husband threatened to kill his estranged wife and their child (离了就死). In addition, the two sets of in-laws and especially the wife’s mother had been interfering in the couple’s relationship. Although the law is clear on the issue – to grant a divorce or not depends on whether the emotional relationship between the two parties is disrupted – it is not helpful for solving the dilemma. The adjudicating judge decided for adjudicated denial for the first-time petition, but the wife filed the petition again six months later. While an adjudicated divorce would customarily have been granted in the second-time petition, the adjudicating judge was uncomfortable doing so. Under these circumstances, submitting the case to the adjudication committee was to be a feasible option, and so she did, suggesting another adjudicated denial. Needless to say, the committee upheld the suggested opinion. After all, nobody wanted to bear the blame if the husband carried out his murder threat.

The Gender Dynamics of Threats to ‘Social Stability’

The effect of these various tactics is that most parties ultimately accept a mediated result or withdraw their case. But with respect to recalcitrant litigants, the courts must still adjudicate. In the Maoist tradition, divorces were generally denied, no matter the factual context. By contrast, the current practice appears to lead to highly gendered outcomes. Of course, many factors shape the strategies and mentalities of the parties on marital breakdown. Education, social status and availability of social support may all interact with gender and, in turn, create complicated effects on psychological reactions to conjugal conflicts. In making decisions, courts weigh all of these factors and their interactions. Nonetheless, two significant patterns are apparent, which arise from the overarching concern for social stability.

First, it is highly likely that a court will grant an adjudicated divorce when the husband initiates a divorce petition but the wife resists with a death threat. This type of case is usually contested because the man has either achieved a higher socioeconomic

status or he is in a new relationship. Although a wife will be aware of the changed circumstances, she may nevertheless oppose the divorce. Typically in these cases, the judge will attempt to persuade the wife to give up, because she cannot be happy in a marriage in which her husband no longer loves her. As for the man, the key is to persuade him, usually through moral rhetoric, to compensate the woman economically. The likelihood of the wife peacefully accepting the divorce decision is related to the level of compensation agreed and, more specifically, whether she will be able to maintain her standard of living. Of course, a necessary precondition to this mediated outcome is that the judge has demonstrated that she has exhausted all alternative strategies to preserve the marriage.

In one case, the wife, who was no longer in employment, had contracted serious arthritis when giving birth to her daughter. She contested the divorce application brought by her husband, who now worked in another city and had been involved in another relationship. Although the wife and her relatives scolded the husband for his behaviour, the husband's response silenced them at the hearing: 'a divorce is unfair to her, but because of her disease, we have not had sex for five years. Is this fair to me? Not that I do not take care of her, but I have my own life' (NS1306). Nevertheless, the wife still resisted the divorce, ostensibly because she wanted her daughter to be raised within a two-parent family.

Despite her objection, the court granted the divorce. The judge explained to the wife that the marriage was a shackle for both of them. In the judgement, the wife received all of the matrimonial assets and the husband was responsible for child support, an outcome that seems unjustifiable in terms of the principles of no-fault divorce. But the judge, speaking to the husband in private, the judge attempted to justify her decision:

When she married you, she was healthy and young. Now you abandon her simply because she is ill? You have to take care of her. Yes, she is ill, but she is also the mother of your daughter. Your life is full of hope because you will get married soon, but she will not. And if you mercilessly refuse to compensate her, how can your daughter respect you when she grows up? (NS1306)

The second type of gendered outcome of divorce cases is when a husband resists a divorce by violence. In this situation, the court will likely refuse the divorce. This type of case often occurs because the wife's social status has become greater than that of the husband. His objection to the divorce can be understood in terms of an attempt to maintain his dignity as the husband of the family. The reasoning employed by men in this situation is exemplified by the following statement by a husband in one case:

I will die in front of the courthouse if you judge render a divorce decision. After all, I do not have any hope....Now that my life is destroyed and I do not want to live, *I will make hers miserable for the rest of her life* (NS1307).

As a form of resistance, these threats are similar to suicidal protests (Lee and Kleinman, 2003). In the political context of modern China, few judges or officials can afford to ignore them. The fear is that a man's emotional and psychological state

may lead him to behave violently towards a wife who seeks her independence through divorce.

In this scenario, divorce is often denied, even if a party has filed the petition on a number of occasions. Because of the man's stubborn refusal, the court will force the wife to compromise, ostensibly so that his threats do not materialize. The rationalization is that she can always file another petition in 6 months time and eventually she will have a better life. But an immediate divorce could have serious repercussions for the man. The denial of the divorce thus is intended to give the husband time to adjust to the new reality so that he will be better prepared when the divorce eventually is granted.

In short, women face more barriers to obtaining a divorce than do men, even if the circumstances that led them to the court are similar. The difference can be explained in terms of the need to protect the weaker party so as to avoid malicious consequences. When the Marriage Law was amended in 2001, it granted both husband and wife equal rights to obtain a divorce, a change intended to achieve gender equality. The no-fault rule was the means by which this was to happen. However, the concern for social stability resulted in the reproduction of gender inequality as it exists in Chinese society through divorce proceedings. While men are likely to be able to 'move on' from their marriage to new relationships, women will find it difficult to extricate themselves from marriage because they are less able to act in a way that will be interpreted by the court as a 'clear and present' threat to social stability.

Consequences of 'No Malicious Incidents'

The Consequences of the Privileging of 'Social Stability'

To this point, this article has sought to demonstrate the important role that the value of maintaining social stability plays in Chinese divorce proceedings. From this analysis, it has become apparent that there are a number of unintended consequences that result from the attempts by the courts to minimize any actions by the parties, which could be considered to threaten that social stability. This section analyses those implications.

Some litigants take advantage of the concerns of the court in order to obtain a ruling in their favour. For example, a party to divorce proceedings may be able to influence the court's decision by deploying threatening words and behaviour. In this way, resort to violence is encouraged and reproduced. Paradoxically, a policy that prioritizes stability creates incentives for parties to act in ways that would be considered disruptive to social order.

For example, in several cases, wives threatened to commit suicide if they could not get divorced (IS1301, IS1307, IS1309, IG1303). In another case, a plaintiff refused to leave the court president's office after the trial because she did not want to be divorced by her newly married husband. The man was later pressured by the court to remain in the marriage (NS1314). In a case from Jiangsu, the husband's agitated state appeared to be a tactic designed to gain an advantage in the division of matrimonial property (IJ1402).

By contrast, some male plaintiffs do pay a heavy price to obtain a divorce. As shown earlier, despite the no-fault principle, in one case all of the matrimonial property was awarded to the wife and he remained financially responsible for their child. This can be

explained by the blame that was attached to him for engaging in an extramarital affair and the need to placate the wife. In this example, the focus on maintaining social stability appears to undermine the no-fault basis of divorce by punishing him for his actions, which destabilized the family unit.

Although judges try to prevent malicious incidents through this approach, nevertheless such incidents continue to occur.² In 2016, a Beijing judge was shot dead by a man against whom a divorce decision had been rendered (Sina.com, 2016). More common are those incidents that result from the delays to obtaining divorces, which are the result of attempts to maintain social stability. Many litigants now wait years to obtain a divorce. If a relationship has already deteriorated, the court's refusal of a divorce forces a couple to remain under the same roof. This can lead not only to unhappiness with the situation but also to domestic violence. In May 2005, a woman in Guangxi Province suffered serious domestic violence from her husband. She committed suicide after her divorce petition was rejected for the fourth time. Ironically, the basis for the refusal was that the relationship had not completely broken down (IG1401).

For the judiciary, the current mode of divorce proceedings has also become burdensome. One judge indicated that she alerts her supervisor and fellow judges when it appears a case might become 'explosive'. This was so that they would be ready to provide assistance. It has been known for judges to make emergency telephone calls to the police because of the possibility of imminent violence (Yang, 2015). During the enforcement stage of a divorce case, a court in Wuyuan, Jiangxi Province, deployed court sheriffs to the home of the parties. This was to prevent any malicious incidents from occurring when the wife moved out with the property that the court had awarded to her (Wuyuan Court, 2012). Even though such tactics have proven to be effective in maintaining order, the need to resort to them takes its toll on the judges involved.

Furthermore, many judges inevitably become emotionally involved in the lives of parties. In order to successfully bring a case to the point of settlement, a judge must gain the trust of the parties. The result is that many judges receive daily calls from litigants, who will ask for advice on even the most trivial matters. One judge stated that 'at 11 pm I still receive text messages from my litigants'. She continued:

I am really not capable of handling this case [in which she has been so involved]. I am too familiar with the two sides and I am mired. I cannot judge whether they should be divorced or not because I have stepped into the ambit of their private lives. I can see the heartfelt desire of the plaintiff to leave the man, but I can also hear the outcry of the man to defend his marriage. Both requests are equally understandable and reasonable. I want to satisfy both, but I am not able to. My whole body and mind are submerged in the case. (IS1309)

The case in which the husband threatened to cut off the feet of his wife was discussed by the adjudication committee twice and lasted nearly 3 years in total. Because the two sides originally could not stay in the same room, the judges in charge struggled to arrange meetings. After interviewing each party numerous times, the judges interviewed several family members, in order to better understand how they assist the parties.³ These efforts were not helpful. The wife sobbed each time she met the judge and repeatedly

stated that she could no longer stay with her husband. He, in turn, threatened to kill both her and their child if they divorced. The judge in the case described the impact upon her:

I suffered insomnia because of this case. When the sobbing face of the wife loomed large, the threatening words of the husband emerged. One day, the plaintiff in another case was killed by her husband. When I heard the news, my head exploded. I thought it was my case. I am tired, I am exhausted, I don't want to be a frontline judge anymore. I would rather be transferred to the administrative or logistics branch. I do not want to handle any cases. I just cannot do it anymore. I cannot afford to take it anymore because if I continue to do this, my life expectancy will be shortened. (IS1310)

The judge's description underscores the emotional and physical exhaustion caused by managing divorce cases. She believes that she would not be able to process 10 cases per year if each of them was as complicated as this one. But this realization would create another source of stress because a significant part of her income is determined by her performance, as measured by the number of cases she brings to a conclusion. Judges also find themselves forced to pick up cases that prove too difficult for less experienced members of the judiciary. One judge described wanting to quit her job because of the difficulty of managing complex and emotional cases.

Conclusions and Implications

This article cannot claim to comprehensively describe the variety of divorce court practices and proceedings in China today. Moreover, the experience of the court which was studied may not be representative. It is possible that concerns around social stability are more salient in the decision-making process because this court is geographically and culturally remote from the centre. The judges interviewed may also have had experiences that are atypical and their recollections may have resulted in exaggeration of the details. My own observations are also inevitably selective and may not be representative. Despite these limitations in the data, however, a fundamental theme emerges from this research: the significant impact of the concern for social stability in the process of handling highly divorce cases in (at least some) Chinese courts. In response to the pressure to maintain social stability, the judges employed a series of tactics. This gave rise to some unanticipated effects in terms of the impact on legal principles and the fairness of the decisions reached.

This article has also demonstrated how many divorce cases end with a settlement achieved through mediation. Although mediation has a long history in Chinese divorce proceedings, how mediation functions today in the courts differs greatly from the traditional Maoist mode.

Furthermore, this article has explored how politics informs the application of Chinese divorce law. This is apparent in the current emphasis on advancing the policy of minimizing malicious incidents in order to ensure social stability. This goal, however, in some cases may run counter to justice with respect to the parties in the case and, in the extreme, might undermine the legitimacy and authority of the law itself. Policies and practices, which emphasize social stability as part of judicial decision-making, thus may have unintended and even perverse consequences. This includes the creation of social

unrest through the incentivization of protest and violence. This point has been made previously with respect to the overall trends in Chinese legal development (Liebman, 2011), and in the specific contexts of land (Gillespie and Fu, 2014), labour (Su and He, 2010), medical malpractice (Liebman, 2013), and environmental protests (Brettell, 2008; Stern, 2013; van Rooij et al., 2012). Echoing these studies, this article demonstrates that judges develop tactics for 'explosive' cases that differ from those used in the mundane divorce proceeding. In ordinary cases, judges appear to routinely follow legal principles. In the 'explosive' case, however, the legal principle of 'the breakdown of mutual affection' can give way to upholding the policy of 'no malicious incidents'. Basing their perceptions on the likelihood of violence, judges have become hostages to perceived threats by parties in divorce litigation.

The findings are particularly striking because divorce cases frequently involve personal feuds and even hatred between individuals and families. But unlike cases that affect a large number of citizens, a divorce would appear unlikely to escalate into a broader conflict threatening social stability. While many Chinese judges also expect to make decisions based on their professional analysis, few are immune to these political concerns. In fact, their responses provide evidence that the penetration of politics in divorce proceedings is significant. If the concern for social stability is pervasive in divorce proceedings, we can imagine the influence of politics in other forms of judicial decision-making.

In addition, the infusion of politics in divorce proceedings has had implications for the gendering of decision-making. Since male threats are perceived as more credible than those of women, courts tend to respond more readily to them as a threat to stability. By contrast, the courts will apply pressure to women to accept divorce (although they will compel men to provide economic compensation). The courts seem unable to apply the same level of persuasion towards men in similar situations to accept a divorce. They can do very little to persuade men in similar situations to accept a divorce. In this way, the courts reproduce gender inequality present in relationships and society more broadly. This article thus adds to the existing literature on how socialist states such as China perpetuate gender inequality (Stacey, 1983; Wang, 2013; Watson and Ebrey, 1991; Woo, 2003).

Although the relationship between law and politics can never be characterized in terms of separate, bounded spheres (Thompson, 1975), this article does shed light on the ways in which a political concern has shaped one area of Chinese law in practice. At least in potentially 'explosive' cases, it seems that courts will defer to a political imperative over what might be expected in terms of the professional norms of judicial decision-making. While the proportion of cases exhibiting this phenomenon may be small, the broader impact on judicial culture is highly significant.

This begs the question whether this approach is sustainable. As the concern with social stability grows, the way in which judges exercise their functions changes. They appear to adopt a more therapeutic role, drawing on discourses of psychology and social work. Despite their best efforts, the result appears to be multiple petitions to end a marriage and increased threats of violence. Moreover, the courts' authority may be undermined when concerns for social stability become paramount. Although there is nothing inherently wrong with the promotion of social stability through family law, one worrisome difference between China and other jurisdictions is that China's concern for

stability increasingly gives rise to judgements being made in terms of the performance of individual judges. That is, if a party makes good on his threat of violence as a result of the granting of a divorce, this should not be interpreted as the fault of the judge. If judicial responsibility for a party's acts becomes entrenched, it would raise serious questions about decision-making and the legitimacy of legal procedure. Indeed, recent developments suggest that the judiciary has attempted to respond to this development (Meng, 2013). If China is serious about promoting social stability, it is the independence of the judiciary which should be of paramount importance.

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Notes

1. In 2012, the courts received 1.68 million first instance family and marriage cases, constituting 23% of the docket (Yuan, 2013).
2. The following reports are the tip of the iceberg: In August 2009, due to her discontent with the judges' decisions and their treatment of her in the handling of her husband's divorce petitions against her, a woman placed a coffin with statements condemning the judges on it in front of a court in Foshan. She did this before her divorce hearing commenced as a way of protesting the judges' actions (see Hkcd.com.hk, 2009). In June 2010, it was reported that a man who had been aggrieved by the court's earlier ruling on the division of marital property opened fire in a court in Hunan, resulting in the death of three judges and injury to another judge and two clerks. The man later committed suicide at the scene by shooting himself. According to the report, none of the judges killed had handled the man's divorce case (see Apple Daily, 2010). In April 2011, while the Hefei Intermediate People's Court was adjudicating a divorce appeal, the female litigant, who had opposed a divorce from her rich husband, rushed into the washroom and attempted to commit suicide by drinking pesticide (see Hexun.com.tw, 2011). For more similar reports, see Sina.com.cn, 2013; Xinhuanet.com, 2005, 2009.3. A Hunan judge told me that resorting to family members is a useful tactic because the litigants usually take their opinions seriously (interview, 30 April 2015).

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