

# WHEN THE CULTURAL EXPLANATION IS INADEQUATE: THE INSTITUTIONAL CONSTRAINTS OF CHINESE JUDGES IN DIVORCE CASES

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The existing literature has long attributed the gendered outcomes in China's divorce litigation to the influential patriarchal culture outside and inside the courtroom. This Article argues that such an explanation remains inadequate. Instead, it contends that institutional constraints that judges are subject to, a factor largely ignored by the existing literature, play a crucial role in generating gendered outcomes. The judges are responding to two sets of interrelated institutional constraints: efficiency concerns and stability concerns. The efficiency concerns mean that judges are supposed to handle cases efficiently. The stability concerns mean that the court decision is accepted by the litigation parties and by society at large, and it does not foment social instability. Due to these concerns, judges often choose the most efficient, yet safest way to handle issues in divorce litigation. They do not alleviate cultural biases against women—rather, they perpetuate them.

Focusing on women's hesitancy to raise gender-related issues, an aspect illuminating on the cultural bias, this Article demonstrates how judges, under institutional concerns, turn a blind eye to their suffering. Judges rarely inform women of their rights; furthermore, they avoid the issues even when they learn the facts. Occasionally, they use the issue as a bargaining chip to facilitate closing a case. Suffering from this gender bias in court, women fail to voice their claims and are awarded less property or compensation than they deserve. This Article argues that due to judges' inaction toward the traditional and cultural taboo for women to

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1. [Editorial Note: this Article is largely based on the Professor He's decade-long fieldwork. Many sources are solely on file with him. To duly protect interviewees' privacy, our Editorial Board does not request the original copy of the fieldwork. We pay great deference and respect to Professor He and all interviewees.]

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articulate their unfair treatment on gender issues, women are denied fair decisions.

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## I. INTRODUCTION

Nowadays, Chinese courts handle 1.5 million divorce cases every year.<sup>3</sup> In many senses, the outcomes of the litigation are gendered. Take domestic violence as one example. The Supreme People's Court (SPC) reports that 14.86% of the divorce litigation was triggered by domestic violence in 2016 and 2017, constituting the second most cited reason for filing for divorce.<sup>4</sup> But rarely is domestic violence recognized by the courts, let alone are families often awarded compensation.<sup>5</sup> Empirical research based on all family cases filed in one district court in Chongqing, Western China, suggests that of all 458 cases involving claims of domestic violence, only in three, or 0.66%, were the victims compensated.<sup>6</sup> For all domestic violence evidence presented in the cases handled by the intermediate courts in Beijing, only 17.3% were admitted.<sup>7</sup> The issue of domestic violence was vaporized into the

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3. A major category of civil trials in China, divorce cases, makes up 27% of all civil cases in 2017. In many areas, designated family courts have been set up to handle the growing caseloads in this area of the law, most of which are petitions for divorce. See ZHOU QIANG (周强), ZUIGAO RENMIN FAYUAN GONGZUO BAOGAO (最高人民法院工作报告) [THE SUPREME PEOPLE'S COURT ANNUAL WORK REPORT] (2018), <http://www.court.gov.cn/zixun-xiangqing-87832.html>.

4. SIFA DASHUJU YANJIU YUAN (司法大数据研究院) [SUPREME PEOPLE'S COURT BIG DATA STUDY CENTER], SIFA DASHUJU ZHUANTI BAOGAO: LIHUN JIUFEN (司法大数据专题报告离婚纠纷) [JUDICIAL REPORT BASED ON BIG DATA: DIVORCE DISPUTES] (2018), [http://www.court.gov.cn/upload/file/2018/03/23/09/33/20180323093343\\_53196.pdf](http://www.court.gov.cn/upload/file/2018/03/23/09/33/20180323093343_53196.pdf).

5. Michael Palmer, *Domestic Violence and Mediation in Contemporary China*, in *MEDIATION IN CONTEMPORARY CHINA: CONTINUITY AND CHANGE* 286, 313–14 (Fu Hualing & Michael Palmer eds., 2017).

6. Chen Wei (陈葳) & Duan Weiwei (段伟伟), *Fayuan Zai Fangzhi Jiating Baoli Zhongde Zuoyong Shizheng Yanjiu—Yi Chongqing Mouqu Renmin Fayuan Shenli Sheji Jiating Baoli Anjian Qingkuang Wei Duixiang* (法院在防治家庭暴力中的作用实证研究—以重庆某区人民法院审理涉及家庭暴力案件情况为对象) [*Empirical Research of the Court's Role in Combating Domestic Violence—Take Grassroot People's Court of Chongqing City One District Hearing Domestic Violence Cases as Example*], *HEBEI FAXUE* (河北法学) [HEBEI L. SCI.], Aug. 5, 2012, at 28, 29, 32.

7. Gao Xin (高鑫), *Jiabao Rending Jin Yicheng, Juzheng Buli Shi Guanjian* (家暴认定仅一成, 举证不力是关键) [*Only Ten Percent of Domestic Violence Cases*

seemingly reconciliatory and friendly air of the mediation process.<sup>8</sup> The gendered outcomes are also conspicuous on property division. According to Ke Li and Sara Friedman's examination of 171 divorce lawsuits collected from Sichuan province, more often than not, "rural women walked away from divorce litigation with no farmland, no housing, and no financial compensation, let alone alimony. By contrast, their husbands were far more likely to retain *de facto* or *de jure* control over family and conjugal property."<sup>9</sup>

Undoubted are the outcomes which disadvantage women; less appreciated are the reasons behind the gendered effects. The existing literature has, explicitly or implicitly, attributed this to the influential patriarchal culture outside and inside the courtroom. Outside the courtroom, China's society, to a large extent, remains a patriarchal society. Many Chinese still share a patrilineal belief, which regards women as an instrument to bypass their bloodline; naturally, children belong to the man's side. The patrilocal tradition commands women to stay in men's communities after marriage.<sup>10</sup> Professor Michael Palmer believes that patriarchal socialism still characterizes many parts of China today.<sup>11</sup> According to him, patriarchal socialism "was created in large part by the Chinese Communist Party's willingness to sacrifice socialist goals of gender equality and women's release from family patriarchal authority structures in exchange for the political support that would be generated by tolerating rather than attacking traditional family values."<sup>12</sup> He also believes that the lack of an independent women's movement, a point related to social awareness of the gender issue, constitutes a major

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*Was Recognized, Mainly Due to Lack of Evidence*], JIANCHA RIBAO (检察日报) [PROCURATORATE DAILY], Nov. 2, 2016, §8.

8. Xin He & Kwai Hang Ng, *In the Name of Harmony: The Erasure of Domestic Violence in China's Judicial Mediation*, 27 INT'L J.L. POL'Y & FAM. 97, 109 (2013).

9. Ke Li & Sara L. Friedman, *Wedding Marriage to the Nation-State in Modern China: Legal Consequences for Divorce, Property, and Women's Rights*, in DOMESTIC TENSIONS, NATIONAL ANXIETIES: GLOBAL PERSPECTIVES ON MARRIAGE, CRISIS, AND NATION 147, 161 (Kristin Celello & Hanan Kholoussy eds., 2016).

10. See generally JUDITH STACEY, PATRIARCHY AND SOCIALIST REVOLUTION IN CHINA (1983).

11. Palmer, *supra* note 5, at 314.

12. *Id.* at 287.

barrier toward fighting against domestic violence.<sup>13</sup> When it comes to the partition of matrimonial property in a divorce, patriarchal culture takes a toll on women. Professors Li and Friedman state:

In the countryside, longstanding patrilineal values and property regimes, coupled with norms of patrilocal residence after marriage, diminish the quality of legal advice women receive from legal workers and the value of settlements offered by judges and court-based mediators. In most cases, these outcomes reaffirm married women's outsider status in their conjugal communities and their weak claims to conjugal property still defined in patrilineal terms, irrespective of the letter of the law.<sup>14</sup>

Pertaining to the courtroom, scholars argue that judges lack sufficient gender consciousness in protecting women's interests and fail to realize this is a serious problem. Imbued with patriarchal culture, the biased norms have been internalized. The male's view is so dominant that the judges do not realize that they are biased. Subscribing to this view, Professors Charles Ogletree and Rangita de Silva-de Alwis attribute the weak judicial protection because Chinese judges are "insensitive[e]," and poorly educated on the gender issue.<sup>15</sup> This view is echoed by Palmer, who states that "[r]esistance to more enlightened understanding of the issue of domestic violence even in the post-Mao reform period was also fortified by unsympathetic and conservative attitudes within the judiciary."<sup>16</sup> Li and Friedman state:

[Rural women's] marital grievances often fall on deaf ears; their efforts to correct conjugal wrongs are regularly dismissed; and, at the time of divorce, their endeavors to actualize property rights are frequently blocked or even derailed by a fragmented state whose divorce actors espouse uneven commitments to gender equality.<sup>17</sup>

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13. *Id.* at 313–14.

14. Li & Friedman, *supra* note 9, at 163.

15. Charles J. Ogletree Jr. & Rangita de Silva-de Alwis, *The Recently Revised Marriage Law of China: The Promise and the Reality*, 13 *Tex. J. Women & L.* 251, 285 (2004).

16. Palmer, *supra* note 5, at 287.

17. Li & Friedman, *supra* note 9, at 158 (emphasis added).

Patriarchal culture is surely one reason contributing to the gendered outcomes in divorce litigation, especially in the rural and hinterland China where the culture's impact is more pronounced. But such an explanation remains inadequate. If patriarchal culture was a major reason for the gendered outcomes in divorce litigation in the early stage of the reform, its role should have declined significantly today. The Chinese state has continued to promote the idea of gender equality in its rhetoric and laws.<sup>18</sup> The norm of gender equality, along with globalization, has gained wide acceptance. The remarkable impact of the #MeToo Movement is just an example. Professor Margaret Woo argues that increasing the "use of the formal legal process has altered women's sense of entitlement and equality."<sup>19</sup> The judges, even in the hinterland areas, are crystal clear that domestic violence is wrong and must be penalized. After all, a law solely devoted to fight against domestic violence has been promulgated in 2015.<sup>20</sup> Some judges have managed to prove the presence of domestic violence, the most difficult step for evidence collection in the hearing.<sup>21</sup> Should they subscribe to the patriarchal culture that women just deserve to be beaten, they do not even need to collect the evidence at all, let alone grant a divorce for them. If Ogletree and Alwis are right in that one of many barriers to enforce women's legal rights is the problems of the judiciary, they would have not limited their focus on internalized judicial biases.<sup>22</sup> There must be other reasons, joining forces with patriarchal culture, for the judges to render a gendered decision.

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18. Robin Runge, *Operating in a Narrow Space to Effect Change: Development of a Legal System Response to Domestic Violence in China*, in *COMPARATIVE PERSPECTIVES ON GENDER VIOLENCE* 31–42 (Rashmi Goel & Leigh Goodmark eds., 2015).

19. See Margaret Y.K. Woo, *Shaping Citizenship: Chinese Family law and Women*, 15 *YALE J.L. & FEMINISM* 99, 100–01 (2003); see generally Mindie Lazarus-Black, *Law and the Pragmatics of Inclusion: Governing Domestic Violence in Trinidad and Tobago*, 28 *AM. ETHNOLOGIST* 388 (2001).

20. Fan Jiating Baoli Fa (反家庭暴力法) [Anti-Domestic Violence Law] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 27, 2015, effective Mar. 1, 2016) 2016 *STANDING COMM. NAT'L PEOPLE'S CONG. GAZ.* 27, translated in *PKULAW.COM*, [https://pkulaw.com/en\\_law/ac57ba1df4413457bdfb.html](https://pkulaw.com/en_law/ac57ba1df4413457bdfb.html) (last visited Feb. 6, 2019).

21. He & Ng, *supra* note 8, at 104.

22. See Ogletree & Alwis, *supra* note 15, at 284–85.

This Article argues that institutional constraints to which judges are subject, a factor largely ignored by the existing literature, play a crucial role in generating gendered outcomes. The importance of institutional safeguards in the judiciary is long noted.<sup>23</sup> As Professors Kwai Hang Ng and Xin He point out, the Chinese courts are embedded.<sup>24</sup> Extra-legal factors permeate into the decision-making process.<sup>25</sup> The court is also a bureaucratic institution controlling the behavior of the judges.<sup>26</sup> As a result, twisting the divorce law practices are the bureaucratic incentives of the court and its political concerns for social stability.<sup>27</sup> The judges are responding to two sets of interrelated institutional constraints: efficiency concerns and stability concerns.<sup>28</sup>

The efficiency concerns mean that judges are supposed to handle cases efficiently. *Civil Procedural Law*<sup>29</sup> stipulates that cases tried by ordinary procedure are to be completed within six months, and those using the simplified procedure have only three months to finish.<sup>30</sup> Some senior officials managing their courts even shorten the limits to ninety or twenty days, respectively, to allow themselves more room to maneuver.<sup>31</sup> The case closure rate, an indication of the effectiveness and efficiency of

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23. See Mark A. Cohen, *Explaining Judicial Behavior or What's "Unconstitutional" about the Sentencing Commission?*, 7 J.L. ECON. & ORG. 183, 184 (1991); Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 BYU L. Rev. 827, 827; Richard A. Posner, *What Do Judges and Justices Maximize?(The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 3 (1993); Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1337, 1391-92 (1998).

24. See generally KWAI HANG NG & XIN HE, *EMBEDDED COURTS: JUDICIAL DECISION-MAKING IN CHINA* (2017).

25. *Id.* at 17.

26. *Id.* at 84.

27. *Id.* at 130.

28. See Jonathan J. Kinkel & William J. Hurst, *The Judicial Cadre Evaluation System in China: From Quantification to Intra-State Legibility*, 2015 CHINA Q. 933, 942.

29. Minshi Susong Fa (民事诉讼法) [Civil Procedure Law] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9, 1991, amended June 27, 2017, effective June 27, 2017), 2017 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 508, translated in CHINA INT'L COM. CT., <http://cicc.court.gov.cn/html/1/219/199/200/644.html> (last visited Feb. 6, 2019).

30. *Id.* arts. 149, 161.

31. NG & HE, *supra* note 24, at 57.

court operations, appears in every court's annual work report.<sup>32</sup> By December of each year, many courts stop taking new cases so that they can increase the case closure rate for the year.

The stability concerns mean that the court decision is accepted by the litigation parties and by society at large—it does not foment social instability.<sup>33</sup> This is controlled by the appeal rate, the remand rate, the petition rate, and the number of malicious incidents, including social protests and deaths.<sup>34</sup> The judiciary trumpets a slogan “to achieve the combination of both legal and social effects.”<sup>35</sup> While the legal effects suggest the observations of legal principles and rules, social effects imply that society accepts the decision peacefully. It would be nice if the two were consistent and mutually reinforcing. But when they conflict, legal principles and rules have to make way for social effects. That is, the law is compromised.

The best example to illustrate these two concerns is the revival of mediation. Since the early 2000s, the mediation rate has, once again, become an indicator for the court performance, though such a requirement has been abandoned by some courts during some periods, depending on the political environment, caseload pressures, and the preferences of court leaders.<sup>36</sup> Mediation, by definition, means both parties have voluntarily settled on the issues. They thus have accepted

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32. Kinkel & Hurst, *supra* note 28, at 942, 944.

33. See Carl Minzner, *Judicial Disciplinary Systems for Incorrectly Decided Cases: The Imperial Chinese Heritage Lives On*, 39 N.M.L. REV. 63, 72 (2009); Benjamin L. Liebman, *A Populist Threat to China's Courts?*, in CONTEMPORARY CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN CHINA 269, 269 (Margaret Y.K. Woo & Mary E. Gallagher eds., 2011); see generally THE POLITICS OF LAW AND STABILITY IN CHINA (Susan Trevaskes et al. eds, 2014).

34. Xin He, 'No Malicious Incidents': *The Concern for Stability in China's Divorce Law Practice*, 26 SOC. & LEGAL STUD. 467, 469 (2017).

35. See Xin He, *Routinization of Divorce Law Practice in China: Institutional Constraints' Influence on Judicial Behaviour*, 23 INT'L J.L. POL'Y & FAM. 83, 103 (2009).

36. Fu Hualing & Richard Cullen, *From Mediator to Adjudicator: The Limits of Civil Justice Reform in China*, in CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN CONTEMPORARY CHINA, *supra* note 33, at 25; NG & HE, *supra* note 24, at 56; Yedan Li, Joris Kocken & Benjamin van Rooij, *Understanding China's Court Mediation Surge: Insights from a Local Court*, 43 L. & SOC. INQUIRY 58, 58, 60 (2018); see Fu Hualing & Michael Palmer, *Mediation in Contemporary China: Continuity and Change*, 10 J. COMP. L. 1, 2–4 (2015).

the court decision. The litigants should not appeal or petition against the decision. In this way, it addresses the stability concern. For some categories of cases, mediation could also be efficient. It saves the time of the judge to divide property, for example. Arguably, it also addresses the caseload concern.

Due to these concerns, judges often choose the most efficient, yet safest way to handle issues in divorce litigation.<sup>37</sup> Judges have to make sure that cases are finished before their deadline and done without malicious incidents.<sup>38</sup> They want a balanced decision, acceptable for both parties, and without provoking extreme reactions.<sup>39</sup> This behavior pattern, the Article argues, results in gendered outcomes.<sup>40</sup>

Under such institutional constraints, the judges do not alleviate cultural biases against women—rather, they perpetuate them.<sup>41</sup> With such an approach, they accept the patriarchal culture, and reinforce gender inequality, turning a blind eye to cultural bias.<sup>42</sup> This is not because the judges are unaware that women's rights are infringed upon, but because they just do not want to infuriate or even confront the men.<sup>43</sup> For their purposes of disposing of the cases efficiently without lingering effects, to do otherwise would be unnecessary.<sup>44</sup>

It is inadequate to say that the brunt to women in divorce litigation stems only from the judges' lack of gender consciousness, or inequalities and biases outside the court.<sup>45</sup> One fundamental reason is that the judges, catering to institutional concerns, consciously and inadvertently, make decisions detrimental to women.<sup>46</sup> Driven by these concerns, they allow the forces of inequality in social, economic, cultural, and political areas to infiltrate their decisions.<sup>47</sup> It is the institutional reasons that prevent the judges from offering a level playing field for women. Equality can only

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37. He, *supra* note 35, at 103–04.

38. See *supra* text accompanying notes 29–35.

39. See *supra* notes 33–35 and accompanying text.

40. See *infra* Part V.

41. See *infra* Parts II–III.

42. See *infra* Part O.

43. See *infra* Part IV.

44. See *infra* Part IV.

45. See *supra* text accompanying notes 15–17.

46. See *infra* Part V.

47. See *infra* Part VI.

be invoked and fulfilled when the courts have acted.<sup>48</sup> Thus, the institutional failure to enforce the laws has become a major obstacle to gender justice.

Focusing on women's hesitancy to raise gender-related issues, an aspect illuminating the cultural bias, this Article demonstrates how judges, under institutional concerns, turn a blind eye to their suffering.<sup>49</sup> Judges rarely inform women of their rights; furthermore, they avoid the issues even when they learn the facts.<sup>50</sup> Occasionally, they use the issue as a bargaining chip to facilitate closing a case.<sup>51</sup> Suffering from this gender bias in court, women fail to voice their claims and are awarded less property or compensation than they deserve.<sup>52</sup> This Article argues that due to judges' inaction toward the traditional and cultural taboo for women to articulate their unfair treatment on gender issues, women are denied fair decisions.<sup>53</sup> The data presented was collected from the author's decade-long fieldwork investigations and participant observations from a rural court in Shaanxi Province, Western China.<sup>54</sup>

## II. SEX AS A TABOO

Around 1927, Wen Hsiu famously filed to divorce her husband Pu Yi, China's last emperor, in part because of his sadism and in part because of his inability to father children.<sup>55</sup> Journalist Behr praised her as courageous with great willpower.<sup>56</sup> Almost a century later, are Chinese women freer to raise gender-and-sex-related issues in their divorce litigation? How do the courts and judges respond to the issues?

Recent decades have witnessed sexual liberation in China. "Sex—in some form or other—has emerged from obscurity to occupy a position of

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48. CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 239 (1989).

49. *See infra* Part 0.

50. *See infra* Part 0.

51. *See infra* Part 0.

52. *See infra* Part VI–0.

53. *See infra* Part 0II.

54. [Editorial Note: Parts 0-0 are based on the author's fieldwork and solely on file with the author himself.]

55. *See* EDWARD BEHR, *THE LAST EMPEROR* 177 (1987).

56. *See id.*

unprecedented prominence in public life in the People's Republic."<sup>57</sup> Issues of sexual autonomy and independence have become more frequently examined and debated. At the time of this writing, many social elites have fallen from grace as the #MeToo movement sweeps through China.

Sexual problems have been a factor contributing to divorce in China.<sup>58</sup> Extra-marital affairs are often cited by litigants to gain the upper hand in legal battles, especially in the more developed areas and when they have a legal representative.<sup>59</sup> Common in the catalog of evidence are intimate text messages, contrition letters, and promises to rectify.<sup>60</sup> After all, extra-marital affairs have become a social reality that can now be discussed in public settings.

On the other hand, despite decades of influence from the outside world, "[t]he two sexes are characterized by different forms of sexual behavior. Normal male behavior is open and outwardly expressive, whereas, in the female, it is more hidden and shy. This signifies a difference between male activity and initiative and female passivity, which is determined by sexual physiology and psychology."<sup>61</sup> Moreover, the Chinese state has maintained control over sex and sexuality, as part of the agenda toward social harmony,<sup>62</sup> and it has to keep sex issues in the family.<sup>63</sup>

57. Harriet Evans, *Defining Difference: The "Scientific" Construction of Sexuality and Gender in the People's Republic of China*, 20 *SIGNS* 357, 357 (1995).

58. Louisa Lim, 'Lightning Divorces' Strike China's 'Me Generation', NPR, (Nov. 17, 2010, 3:28 PM), <https://www.npr.org/2010/11/09/131200166/china-s-me-generation-sends-divorce-rate-soaring>.

59. Zhuang Pinghui, *Why Millions of Chinese People are Filing for Divorce Every Year*, SOUTH CHINA MORNING POST (Oct. 30, 2017, 8:01 AM), <https://www.scmp.com/news/china/society/article/2117424/why-millions-chinese-people-are-filing-divorce-every-year>.

60. See Xin He & Kwai Hang Ng, *Inquisitorial Adjudication and Institutional Constraints in Chinese Civil Justice*, 35 *L. & POL'Y* 298, 301–02 (2013).

61. XING ZHISHI BAIKE (性知识百科), [ENCYCLOPEDIA OF KNOWLEDGE ABOUT SEX] 97 (Wang Peng (王鹏) et al. eds., 1983).

62. Gary Sigley, *Sex, Politics and the Policing of Virtue in the People's Republic of China*, in *SEX AND SEXUALITY IN CHINA* 43, 43–45, 48–49 (Elaine Jeffreys ed., 2006).

63. *Id.* at 44, 50.

Evidence suggests that male impotency is a common problem in reform China.<sup>64</sup> Discussions of impotence in the media and on the Internet are common.<sup>65</sup> Flyers on lamp posts along city alleys advertise clinics for sexually transmitted diseases and male sexual dysfunction.<sup>66</sup> Commercials appear on TV and in other media touting “herbal tonics to cure impotence.”<sup>67</sup> In Dr. Everett Yuehong Zhang’s words, impotency is an epidemic.<sup>68</sup> Nonetheless, a search for publicly available adjudication documents reveals only a handful of such issues that have surfaced in the decisions. Of 1.9 million divorce cases from 2008-2018, only 654 petitions filed by women were on the basis of male impotence.<sup>69</sup> Zhang finds no research supporting the “rise in the incidence of divorce due to male impotence.”<sup>70</sup> At least in these public sources, the instances in which women file petitions based on male sexual impotence are disproportionately low.<sup>71</sup>

Consistent with the search outcome, my fieldwork investigation and interviews with judges confirm that topics related to sex, such as male impotence, marital or domestic rape, and homosexuality, are rarely touched upon in the litigation process.<sup>72</sup> This is especially true in rural and hinterland areas where these topics remain, by and large, taboo.<sup>73</sup> Mentioning husbands’ impotence seems to suggest women’s indecent desires, falling into the stereotype of licentiousness. Any open talk of male impotence seems embarrassing, and contrary to the image of a decent wife or woman.<sup>74</sup> The traditional picture of the female body

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64. See EVERETT YUEHONG ZHANG, *THE IMPOTENCE EPIDEMIC: MEN’S MEDICINE AND SEXUAL DESIRE IN CONTEMPORARY CHINA* 1 (2015).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 2, 5.

69. PUHUI FAZHI ZHINENG PINGTAI (普惠法治智能平台) [LEGAL INTELLIGENT PLATFORM], <http://phfz.lawbbd.com/> (search in search bar for “sexual impotence” and “divorce”) (last visited Apr. 15, 2020).

70. ZHANG, *supra* note 64, at 123.

71. *See id.* at 124.

72. *See infra* Part III.

73. *See infra* Part III.

74. Petula Sik Ying Ho et al., *Sex with Chinese Characteristics: Sexuality Research in/on 21st-Century China*, 55 J. SEX RES. 486, 491, 510 (2018); cf. Valeriya Safronova, *What’s So ‘Indecent’ About Female Pleasure?*, N.Y. TIMES (Jan. 18, 2019), <https://www.nytimes.com/2019/01/18/style/sex-toy-ces.html>.

remains passive: she never initiates sex, nor does she demand satisfaction.<sup>75</sup> The matter, though central to most marriages, is almost invisible in the legal battle.<sup>76</sup> For cases in which this is the real issue, most female litigants are reticent about it.<sup>77</sup> Both parties ostensibly focus on other issues.<sup>78</sup> At most, they hint at it, before brushing it off.<sup>79</sup>

### III. INHIBITED WOMEN

The following four wives were the exceptions among the victims of the inhibited sex problem.<sup>80</sup> Indeed, according to the judges that I interviewed, they had learned about the situation inadvertently during the mediation process. None of them had left any trace in the case filing statements; nor had they raised it in the court trial process. The courts had never recorded anything either, of course. In a way, how these cases were told already revealed the cultural obstacles to women articulating this problem. The female litigants, often the victims of the cultural bias, had to overcome psychological barriers just to speak out.

A twenty-five-year-old woman from a village in Shandong was married to an optimistic and outspoken lorry driver from a state-owned enterprise (SOE) in Shaanxi (henceforth the Shandong Waitress's Case). She had met him through her uncle, an executive at the SOE, which employed his parents as well. Her uncle had been well-intended. He had hoped the marriage would enable his niece, along with her father (his elder brother) and her mother, to come live with him in Shaanxi. With his help, his niece had been assigned to work as a waitress in the SOE's canteen, and both of her parents got temporary jobs in the SOE.

Two years later, after the unexpected death of the uncle, the marriage went sour. According to the filing statement of the divorce petition, the trigger of the divorce petition had been intensifying conflict between the couple's parents. They had even gotten into a physical altercation, just two weeks before she had filed the petition, and he had threatened to kick

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75. ZHANG, *supra* note 64, at 123.

76. *Id.* at 124–25.

77. *See infra* Part III.

78. *See infra* Parts 0, 0.

79. *See infra* Parts 0, 0.

80. Xin He, *Untitled Fieldwork* (unpublished manuscript) (on file with author). [Editorial Note: unless otherwise cited, this Part is based on the author's *untitled fieldwork*.]

her parents out of his home. Her main requests, in addition to divorce, had been to receive compensation for her contribution to their matrimonial apartments, which had been subsidized by the SOE because of his employment.

The judge, a middle-aged woman, tried to settle the case with the standard inquiry into the cause of the divorce. It was in the pre-trial mediation session that she accidentally uncovered the genuine reason for divorce—she had suggested that family disputes would subside once they had a child. When pressed, the plaintiff said that it would be impossible for them to have children.

Surprised, the judge pushed further, “Is it related to your health?”

The plaintiff looked around, making sure that nobody was in sight and the door was closed. She then lowered her voice, as if it were a secret buried for ages:

No. He has problems in that regard. Having been married for two years, we are like never married. Impotent, he cannot have a child. I have known the marriage was not sustainable since its very beginning. Half a year after being married I told my mother, who stopped me from telling anybody else. She was afraid that my uncle’s family would become aware of it. One year later, our conflict intensified, and I told my aunt (her uncle’s wife) about it. Initially skeptical, she was eventually convinced by my mother-in-law. Indeed, without informing me, my husband went to a big hospital in the capital city for treatment. But it was not cured. My aunt persuaded my mother to accept this: it was not easy to find a trustworthy family; perhaps adopting a child would do. Since back then my whole family had relied on my uncle, my mother was afraid to say no. For that period, I basically lived with my parents, as he was pulling gambling all-nighters, without coming home.

None of this was mentioned during the formal trial. In fact, she was inhibited in front of the defendant, a collegial panel of three, a clerk who took notes of the trial process, two lawyers representing her and one lawyer for the defendant, and ten witnesses. The trial focused on her claims of the man’s gambling practices, a so-called pernicious habit, and family discord. When the man agreed to divorce, the focus soon switched to who was the real owner of the apartment, and whether the woman, along with her natal family, had deliberately encroached upon the man’s property by marrying him.

Male impotence is thus a taboo subject. The man has been reluctant to let anyone know of his condition because it concerned his manly dignity. He had not let his wife know about his efforts for treatment. For a young wife, it was also hard to speak out. Indeed, the woman was pressed by the judge, who pushed for the reason for divorce. The woman had been afraid that without telling the judge the truth, her efforts to get financial compensation would have been jeopardized, though the woman had overcome significant psychological barriers. She had not told her mother until half a year into the marriage. Only after a year had passed did she tell her aunt, the most important relative of her family. Furthermore, this had occurred only after the young couple's conflict had become unbearable. Also buoying her courage was her experience in the suburban areas where she had worked for two years. Still, she remained cautious. She looked over her shoulders when she told the judge about this. Nowhere in the filing statement was it mentioned. It is possible she may have not even informed her two young lawyers. Her inhibition was consistent with that of her mother. When informed, her mother had advised her "not to tell anybody else." She had been afraid that the uncle's wife, the mastermind of the marriage, and their most important relative in Shaanxi, would have been embarrassed. Similarly, her aunt's reaction, after learning this, had been to cover it up and look for alternatives, despite the woman being only twenty-three-years-old. Her advice was to adopt a child. These individuals had shared the conception that male impotency was an embarrassing topic, not suitable for open discussion.

Such an inhibited tendency was also found in the Bride-Price Case, in which a migrant worker in his mid-twenties had filed for divorce because the woman, also a migrant worker, had "refused to live with him." In the filing statement, the man stated that they had met through a matchmaker and got married the fifth time they saw each other. One caveat was in order. This was not a love-at-first-sight story. The first three times they met the couple talked. They were engaged on the fourth meeting, in which the man paid a 130,000 yuan (RMB) bride-price.<sup>81</sup> Then, on the

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81. The bride-price system itself is culturally biased against women. Due to the bride-price system, only families that afford the money have chances to select a bride. These marriages were often in violation of the desires of the individuals and especially those of women: "as if she were an animal just purchased at a market." ARTHUR H.

fifth meeting, they applied for their marriage certificate. The woman then kicked him out of their bedroom the week they were married, and they never lived together. In the official response, the woman stated, "I agreed to a divorce. For the year we were married, I rarely lived with the man, and we did not have much to talk about. He was not capable of making money."

However, they could not reconcile the issue of the bride-price, and the woman also refused to return the living expenses that she had received from the man while they had been married. The responsible judge, a man in his forties, trying to mediate the case, felt puzzled: Why did she not want to live with the man? He then asked a female judge from the district court, also in her forties, who happened to visit the dispatched tribunal where the case was filed, to talk to the woman. Taking the woman to another room, she proposed that the wife continued to live with the man so that he would withdraw the petition. The wife responded:

It was not me who did not want to live with him. It was him who was afraid of living with me. When I took off my clothes, he would tremble, rolling himself into a ball. Every time it was like that; he was unable to do it. For the whole year, we never sleep together. In front of so many people, I cannot speak this out.

Similar to the Shandong woman, she had revealed the truth only in a private conversation with the judge when pressed to reconcile. Her formal responses to the man's allegations had been that they did not have much to talk about and rarely stayed together. She had been unwilling to refute the man because "[i]n front of so many people, I cannot speak this out."

Equally reticent was the plaintiff in the Shanghai Migrant Worker's Case, in which the young wife, already leaving home for work in Shanghai and separated from her husband for over two years, had filed a divorce petition. The filing statement only mentioned that she had been beaten by her mother-in-law. Throughout the pre-trial mediation sessions, she had been reluctant to reveal the truth, even after being grilled by the judge over why she wanted to divorce the man whose family was in economic distress. Her responses were, "But we still

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SMITH, *VILLAGE LIFE IN CHINA* 250 (1899). For an analysis of bride-price, *see generally* JACK GOODY & S.J. TAMBIAH, *BRIDEWEALTH AND DOWRY* (1973).

quarrel every day, every night.” “Every night” was emphasized. She continued, “I left for Shanghai as a migrant worker since I could not stand it anymore.” Her sobbing continued. She also denied that she had been having an affair. Puzzled and impatient, the judge amplified her voice, urging her to withdraw the petition.

At this moment, her lawyer approached the judge, pulling at her sleeve, hinting for a private talk. After they walked to the staircase in the corner, the lawyer whispered:

The boy has that kind of disease, thus cannot have a normal sex life. As a young man, the way he released his desires was to scratch girls’ genitals. She could not sleep the whole night. Her genitals had been injured to the extent that she could not even get out of bed, let alone walk. It was so serious that the girl returned to her natal home and was afraid to go back. After the man stalked her in her natal home, she went to Shanghai. This is the main point for the divorce petition, but the girl is unable to speak up herself.

Then, the judge wondered why the couple had a child. The lawyer responded:

The boy is four-year-old now. The man got the disease, perhaps, two years ago. It was unclear why a young man got such a disease. He had been unwilling to see a doctor. At this young age, he was eager to do it, but he couldn’t. So he did not allow the lady to sleep. She was so tortured and her whole body was trembling when she mentioned this.

The judge was not convinced, that is, until the woman agreed to withdraw the petition, under her lawyer’s persuasion that a divorce would be impossible this time. Happy to learn of the withdrawal, the man pleaded with the woman to go home with him—a patrilocal practice: since the divorce is not granted, the wife is to return home with the man, in spite of the fact she has already filed a divorce petition. The girl grew agitated, “We fought every night. Do you believe we can live together? I feel scared when I see you now!” Upon hearing this, the man’s face froze. He stood still, embarrassed.

In the presence of the husband, the judge, and her lawyer, the woman did not mention her husband’s sexual problem. She only said, “We fought every day and every night.” She tried to use the nightly fighting as cover for the embarrassing topic of male impotency. When the judge

pressed on whether she had another man, she did not reveal the secret. She would have rather taken the moral blame that she was divorcing him for economic reasons. Her response was to sob.

Even after she had withdrawn the case, she avoided mentioning her husband's impotency. What she had said about her husband was, "We fought every night. Do you believe we can live together? I feel scared when I see you now!" When the man's family tried to take her home upon knowing that she had withdrawn the case, she sprang from her chair and cried, "I will not live with you! I will never go to your home! I will file another petition in six months!" Without knowing the real reason behind the fighting, these statements are hard to comprehend. The woman was still trying to use the fighting and other vague language to cover for her husband's impotency. The man, knowing what was implied by her words, turned pale in embarrassment.

Despite living in Shanghai for two years, she was silent on the impotency issue, both orally and written. She used all kinds of words to cover it up, even when pressed by the judge. She only shared this with her lawyer, perhaps because she had learned that her original reason—being beaten by her mother-in-law, who had psychiatric problems—was not enough to grant a divorce, or because she realized that the financial distress of the family would make her divorce petition more elusive. One thing was clear: the cultural bias against open discussion of male impotency is widespread: Even the lawyer had only "whispered" to the judge in the staircase in the corner and used "that kind of disease" to refer to the problem; he did not break the stalemate until the judges urged his client to drop the divorce petition.

Similarly, the young woman in the Attempted Rape Case had been initially inhibited by this cultural bias. She had met her husband while working in the city as a migrant worker. Her husband, a lorry driver, claimed that for over a year she had never been home, abandoning their son and refusing to do any domestic work. Both parties agreed to divorce but fought over custody and property. The girl insisted on the 80,000 yuan land requisition compensation, which would have been her share. The husband's family, however, only agreed to compensate 10,000 yuan, and insisted on child custody with child support.

A private caucus was conducted between the judge and the husband, with his legal representative, but the husband appeared not to have the final say. He consulted his father on every issue. When the judge said 20,000 yuan was too low, given that the land compensation of her share

had already reached 80,000 yuan, the husband's legal representative stepped out of the judge's office, once again, to call the husband's father.

At this moment, the woman went into the office, alone. She had gotten into an argument with her natal family members, who had urged her to give up custody and lower the monetary compensation. She calmed herself, "I have important things to tell you, judge. During the first month after the boy was born<sup>82</sup>, his father tried to rape me. . . . He opened my door, rushed to my bed, embraced me forcefully, kissed me, and wildly fondled my breasts. I resisted frantically, screaming." She later explained that no family members had been around: her mother-in-law was shopping in town; her husband was on his way, driving the lorry. She continued:

This happened three times in total. I took preparatory measures the second time. He held me from behind, and took off my pants. I resisted vehemently, kneeling down to hold his legs and threw him off. I sprang up faster than he did, running out of the home. The third time he almost got me. Unexpectedly, my mother-in-law came home. He had to set me free.

Asked by the judge if she had told anyone about it, she responded:

My mother-in-law did not say a word. She was not in a position to confront my father-in-law, who is the king at home. He beats her all the time. My husband did not trust my words. He said that I had slandered his father, and that I had picked a fight with him. I called to tell my mom. She said that I should not tell anyone, to preserve my good reputation. She agreed to take me back to my natal home once the first month was over.<sup>83</sup> I intended to say this to you but my parents prevented me from doing so. But I believed I should let you know.

Rape, even when unsuccessful, is a serious crime. It is hard to pinpoint how this young woman had been hurt: fear, humiliation, panic, and frustration, with nobody to turn to. This was why she had left her conjugal home right after the child's first month. The divorce had not

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82. This is commonly referred as "Zuo Yuezi (坐月子)," postpartum confinement.

83. According to local customs, it is unacceptable to live in the bride's home for the period.

been because she was lazy, as the husband had claimed, nor had she been ambivalent towards her child: she had insisted on child custody, despite his illness and the stigmatization of being women with children from previous marriages, “Tuo Youping” (拖油瓶).<sup>84</sup>

Even for such a crime, initially, the woman did not make the judge aware. As her own mother had suggested, spreading the word about the rape would have damaged *her* reputation and jeopardized her bride price if she were to remarry. Even her natal family tried to prevent her from revealing this to the judge. She made up her mind to speak out only when the others had left the judge’s office. Apparently, she had been waiting for the right moment. She had sought help from both her husband and her mother-in-law, but both had turned her away. These incidents underscore the cultural bias endemic to this issue.

Of the three victims, this woman was the only one to have taken the initiative to speak out to the judge. She had also hoped to claim more financial compensation. The other two women, by revealing the problem, either directly or indirectly, had only tried to end their marriages. Neither realized that the damages they had suffered also warranted compensation. Was the woman in the Attempted Rape Case the rule, or the exception? In several aspects, this woman was unique. The first was her strong personality: energetic and upbeat, she was willing to disobey her natal family members, including her father and grandfather. Second, she was a victim of attempted rape, the damages of which were arguably more serious than male impotency. However, only she had been in the position to understand the fears, panic, and humiliation suffered in this process. Third, the husband’s family’s offer was laughable. When both parties negotiated the settlement, the position of the husband’s family had been firm: they only agreed to compensate the woman 10,000 yuan, despite the fact that her land requisition compensation had already reached 80,000 yuan. Even the judge suggested that this offer was too low. In her calculus, the compensation she demanded was not just her land compensation, or her contribution to the family welfare, but also the damages that she had suffered. When her demands were opposed—not even her own natal family members were on her side—she had nobody to turn to. Eventually, she overcame the cultural barriers—she had the

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84. Ke Li, “*What He Did Was Lawful*”: *Divorce Litigation and Gender Inequality in China*, 37 L. & POL’Y, 153, 164 (2015).

vague intuition that revealing the truth to the judge would better position her for negotiation.

These four victims each spoke out in the context of mediation. This pattern exists for three reasons. First, mediation often offers a private caucus in which cultural bias is minimized. Even in the Shanghai Migrant Worker's Case, the lawyer took the judge outside of the conference room and told her the genuine reason for the divorce. Second, in mediation, judges always mount pressure. To resist them, the victims have to speak out. Finally, the judge is a woman too, and women appear more comfortable to discuss such embarrassing topics. Indeed, the author never directly heard similar stories from a male judge.

#### IV. JUDGES' INACTION

When they overcame the cultural bias and revealed the truth, how did the judge respond? To what extent are these stories factored into their final judgments? How have social norms affected the courts' decisions, and how do law, gender, and sex interact?

In all four cases, upon hearing the stories, the judges were surprised or shocked.<sup>85</sup> In some circumstances, they were half-convinced. A clear pattern, however, was that no further actions were taken—no verifications, no further investigations, and sometimes not even any further inquiry.

In the Shandong Waitress's Case, the female judge, in her late forties, was herself embarrassed by the topic. She had been trying to talk the plaintiff into withdrawing the case. Upon learning the truth, the judge realized that her proposed solution—a child—would not work. After that, she no longer attempted to persuade the plaintiff to maintain the marriage. The conversation came to a halt, and the plaintiff did not raise it in trial—nor did the judge. As is documented in the literature, in divorce cases, the courts forgo the former practice of investigating the cause for divorce. This had been the convention during the Mao era and the early period of reform.<sup>86</sup> In most cases, the judges had only focused on the issues claimed, and more importantly, only on those integral to

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85. Xin He, *Untitled Fieldwork* (unpublished manuscript) (on file with author). [Editorial Note: unless otherwise cited, this Part is based on the author's *untitled fieldwork*.]

86. He, *supra* note 35, at 90.

their final decisions.<sup>87</sup> In this case, the woman never claimed that the man's sexual impotency had been the reason for divorce. Even though the plaintiff had confided this to the judge in private, her goal was to resist reconciliation pressure from the judges. That goal had already been achieved: the judge stopped pushing. Moreover, the man agreed to a divorce. The issue of whether to divorce had already been settled. Why should the judgment hinge on an embarrassing issue unrelated to the final resolution of the case? Why bother to verify or conduct a further investigation?

This inaction persisted into post-trial mediation. Even though the two parties had difficulty reconciling property division, the judge never even hinted to the man that it had been his erectile dysfunction that had overshadowed, if not caused, the divorce. Had she invoked this issue she could have expected the man's denial. To defend his dignity, he would have fought the allegations. Then to resolve the issue, the court would have had to conduct further investigations. Again, why bother?

The pattern of inaction was also revealed in the Shanghai Migrant Worker's Case, as the judge skirted this issue. It was in the pre-trial mediation session that the problem was revealed, in private, through the lawyer. Nothing had been raised in the formal filing statement. For the same reason, why should the judge bother to look into it? The judge had been convinced only by the conversations and body language between the couple, and the man's embarrassing facial expression. While the revealed reason might help her understand whether or not the marriage could be preserved, any further inquiry seemed redundant, as far as the final decision was concerned. She continued her mediation efforts by informing her lawyer that a divorce outcome for such a first-time petition would be impossible. Thus, she coerced the plaintiff to drop the petition. Similar in the Bride-Price Case, the judge, upon learning the real reason for divorce, stopped pressing the woman, and instead pursued mediation on the bride-price.

The Attempted Rape Case had been different, but not by much. Upon learning of the rape, the judge did nothing to verify the claims. Nor did she report the case to the police, even though she herself, based on the reaction of the husband's legal representative, had believed the woman's

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87. Xin He & Kwai Ng, *Pragmatic Discourse and Gender Inequality in China*, 47 L. & SOC'Y REV. 279, 285–86 (2013).

account. Instead, she used it as a bargaining chip to press the husband's side. She did not encourage the woman to report it to the police or file a criminal case, because that would not have been necessary for her to dispose of the case. To convict the father-in-law, the evidence would have to come not just from the victim, but also from other sources. The woman, when attacked, had been with her less-than-one-month-old baby. In panic and fear, how could she have preserved evidence? As long as the father-in-law denied all the accusations, which was likely, the case would likely not be substantiated. The father-in-law could argue that the woman had framed him. Had that happened, the woman would have lost both face and her reputation, embarrassing both herself and her natal family members even more. Indeed, an attempted but unsuccessful rape often leaves little trace. Encouraging the woman to file a criminal lawsuit might have backfired.

Moreover, the strong-willed father-in-law seemed to enjoy absolute authority within the family. He often beat his wife, and his son was so obedient to him that he sought his bit-by-bit instructions in negotiation. He exemplified the patriarch in China's tradition. He attempted to rape the daughter-in-law three times. At the very least, he knew that she would be unlikely to disclose this. He must have been surprised when she did report it to the judge, a symbol of judicial power and public force. He might not have had a clear idea of whether the judge would take further actions. For him, the best strategy was to compromise and terminate the marriage as soon as possible. This aligned with the judge's goal. Using the incident to force the father-in-law into a financial compromise, in a way, the judge had supported the lady. After all, that was all she had asked for.

This was why the judge had utilized this revelation as a bargaining chip. No matter how much she hated the father-in-law, or how sympathetic she was to the lady, her goal was to close the case. She was unconcerned with whether she could also help the lady. Even if the judge and the victim had managed to locate evidence, the ultimate goal would still have been to end the case. As long as this objective was achieved, any evidence uncovered would have been buried. Obtaining this evidence would have been helpful, but not crucial, to achieving the judge's ultimate goal.

## V. GENDERED OUTCOMES

Judges' inaction is understandable because either encouraging victims to speak out, or taking an assertive role, would upend the balance between the litigation parties. Then, the judges might not be able to achieve the mediated outcomes that fit their interests. This approach takes a toll on women's interests.

In the Shandong Waitress's Case, upon learning the real cause of her divorce, the judge did not tell the waitress that this might provide her with a favorable litigation strategy.<sup>88</sup> Had the woman explicitly stated that sexual impotency had been the real reason for divorce, the dynamics of the trial would have been different. Without clarifying this, the woman, as the plaintiff in a divorce, could only focus on trivial issues, such as the man's gambling and his reluctance to support the family, to prove the breakdown of mutual affection. As a result, the position of the husband's side was arrogant. Throughout the trial and the mediation, they never mentioned impotency. While they agreed to divorce, they staged a show of property encroachment between a poor, greedy rural family and an honest, affluent urban household. They summoned three witnesses, each well-respected in the region, to prove that the man's family was the owner of the apartment. The man's father, a mid-level manager of an SOE, requested a meeting with the judge to detail the purchase process in which he, in order to buy the apartment, had borrowed money from friends and relatives. A divorce rooted in male impotency had thus been transformed into a righteous defense against a greedy encroacher, locating the husband's family on the moral and legal high ground. Had male impotency been disclosed in the trial, the over-confident position of the man's family would have been upended. Of course, it was expected that the man would have fought such allegations, but the law and the evidence would have been on the woman's side.

If this had been disclosed, the adjudicated outcome would have been better for the woman. It seemed that the man, cognizant of his impotency, had still decided to marry the woman, and the marriage had continued for three years while the condition remained uncured. This may have constituted deceit and damages to the woman. According to

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88. Xin He, *Untitled Fieldwork* (unpublished manuscript) (on file with author). [Editorial Note: unless otherwise cited, this Part is based on the author's untitled fieldwork.]

Article 10 of *Marriage Law*,<sup>89</sup> a marriage is void when there is an existing medically confirmed disease inappropriate for marriage that is not cured after the marriage.<sup>90</sup> While impotence is not explicitly listed as a disease inappropriate for marriage, infertility is a serious concern for most families. In judicial practices, this Article usually forms the basis to void marriages. This is also widely understood and accepted among the general public. Furthermore, based on Article 39, the court will then partition the conjugal property in the woman's favor, because the man had concealed his condition before the marriage.<sup>91</sup>

With impotency disclosed, the man's position in the post-trial mediation would have been compromised. With an unfavorable adjudicated decision pending, he might have been willing to make significant concessions. Without the open disclosure, however, the woman's private conversation with the judge served only to resist the judge's pressure toward mediated reconciliation. Since the man was not opposing the divorce, the disclosure accomplished little.

The Shandong waitress did not get what she deserved, and the woman in the Bride-Price Case suffered a significant financial loss. When the judge ran out of ideas to reconcile the two sides, the lay assessor, a retired village official in his early seventies, stepped in to talk to the woman, her parents, and her legal representative, stated:

Look! The other side offering such a big bride-price, the only purpose was to get a daughter-in-law. Your girl kicked the groom out the third day after being wed, and rented a room herself—still refusing to live with him. How would you feel if you were in their shoes? Staying in the man's family for less than 15 days, this might have constituted marital fraud. 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.

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89. Hunyin Fa (婚姻法) [Marriage Law] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 10, 1980, effective Jan. 1, 1981; amended Apr. 28, 2001, effective Apr. 28, 2001) 2001 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 330, translated in CONG.-EXECUTIVE COMMISSION ON CHINA, <https://www.cecc.gov/resources/legal-provisions/marriage-law-of-the-peoples-republic-of-china-amended> (last visited Jan. 19, 2020).

90. *Id.* art. 10.

91. *Id.* art. 39.

Fraudulent sales of women as “brides” are common in China.<sup>92</sup> After making handsome payments, those men soon found their “brides” evaporated, along with the bride token.<sup>93</sup> Of China’s population of 1.4 billion, males are approximately thirty-four million more than females, a demographic nightmare stemmed from the long-time one-child policy and ingrained cultural preference for sons over daughters.<sup>94</sup> The shortage of brides is further exacerbated by village women’s migration to cities in the reform period.<sup>95</sup> Some families have to pay off human traffickers to locate daughters-in-law for their unmarried sons. According to Li:

[E]stranged husbands who are caught up in divorce suits often turn into outraged defendants, taking out their marital frustrations on judges in charge of their cases. Adjudicating divorce thus comes with a set of occupational hazards, harassment, verbal abuse, threats of violence, threats of suicide, revenge aimed at one’s family members . . . The list can go on in terms of the pains angry men can inflict on their judges.<sup>96</sup>

Upon hearing this, the woman’s side was rattled. They immediately accepted a deal to return the full 130,000 yuan bride-price, even though initially the man had only asked for 110,000 yuan. The law states there is no need to return the bride-price under these circumstances because she had indeed lived with the man.<sup>97</sup> The situation would have been more ambiguous had the judge told the woman to raise the man’s erectile dysfunction in the litigation process. Once again, she had been

92. Ke Li, *Marriage Unbound: Divorce Litigation, Power and Inequality in Contemporary China* (Apr. 27, 2018) (unpublished manuscript) (on file with author).

93. *Id.*

94. Simon Denyer & Annie Gowen, *Too Many Men: China and India Battle with the Consequences of Gender Imbalance*, SOUTH CHINA MORNING POST (Apr. 24, 2018, 10:00 AM), <https://www.scmp.com/magazines/post-magazine/long-reads/article/2142658/too-many-men-china-and-india-battle-consequences>.

95. *Id.*

96. Li, *supra* note 92.

97. Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gonghe Guo Hunyin Fa Ruogan Wenti de Jeishi (Er) (最高人民法院关于使用中华人民共和国婚姻法若干问题的解释(二)) [Interpretation of the Supreme People’s Court on Several Issues Concerning the Application of the Marriage Law of the People’s Republic of China (II)] (promulgated by Sup. People’s Ct., Feb. 20, 2017, effective Mar. 1, 2017), art. 10, 2017 SUP. PEOPLE’S CT. GAZ. 6, *translated in* PKULAW.COM, [https://pkulaw.com/en\\_law/2a94712eabb1b472bdfb.html](https://pkulaw.com/en_law/2a94712eabb1b472bdfb.html) (last visited Apr. 15, 2020).

preoccupied with getting a mediated result. The lay assessor, aware of what the judge wanted, had volunteered to threaten the woman's family with a criminal charge, coercing her side to compromise.<sup>98</sup> Since this was consistent with the judge's interests, she had turned a blind eye to the unfair settled outcome.

As for the Shanghai Migrant Worker, the judge had been skeptical of the lawyer's story, but convinced by the man's facial expression and the couple's interactions. The judge had only told the woman's lawyer that a divorce was impossible, and that the family needed time to accept the woman's departure. When the lawyer resisted by saying that she had been away from home for two years and the family should have already been prepared, the judge continued:

That was before the formal divorce petition, which was not understood by the court. This is the first time she has formally filed the divorce petition. This is also the first time for the man's family to understand that she truly wants to leave them. This is different. You have represented numerous divorce cases. Think about it: under such a family background, how much pressure can the little young man take? He said to us that he would rather die than be divorced. Such a threat is realistic, should a divorce be granted now. So, this time, even if we have a formal trial on the case, the outcome would also be rejecting the woman's divorce petition. That is why I hope you can cooperate with us and help persuade the woman to withdraw the petition. She could, of course, file another petition in six months, if she still wants to divorce him then. This divorce petition would be considered when the next petition is adjudicated.

Given the shortage of brides, anxieties over finding a second one after a divorce are palpable, especially for an impoverished family like this. The judge was sensible to find a solution: the case result was a "voluntary withdrawal." The woman gained nothing by revealing the damages she had suffered through her lawyer's private conversation with the judge. A divorce denial was more to address the judge's stability concerns and to allow the man's family more time to prepare for her departure. The judge, realizing the inevitable collapse of the marriage, resorted to the safest strategy: no divorce for the first-time divorce

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98. See also Xin He, *Double Whammy: Lay Assessors as Lackeys in Chinese Courts*, 50 L. & SOC'Y REV. 733, 746 (2016).

petition, whether it was withdrawn or adjudicated. She used the excuse that for the first time; both the court and the man's family knew there would be a divorce.

Such an outcome was not inevitable. Had the judge told the woman and her lawyer to add this reason for divorce to the formal filing statement, she could have cited domestic violence—she had been injured to the extent that she could not walk—and rendered a divorce with financial compensation. Since the issue of the case had been divorce only—not property division—the woman had not suffered financially. However, she had wasted at least six months in the meaningless marriage.

In the Attempted Rape Case, the outcomes were indeed changed by the judge's behavior. In their post-trial mediation, the husband and his legal representative, after consulting the husband's father several times, decided to increase the compensation from the initial offer of 10,000 to 25,000 yuan. This was still well below the woman's demand of 80,000 yuan. The judge asked the man to leave the office and then spoke to his legal representative in private:

50,000 yuan, and no child support. The father-in-law attempted to rape this woman three times. As you see, she just asked me to deal with this matter. I was pondering whether to report this to the police. Why shouldn't I? Now you call your friend, the father-in-law, and see if the woman's requests can be met.

Ten minutes later, the legal representative returned from the call without uttering a word. His facial expression, however, confirmed the accusations. A settlement was struck: the husband's family agreed to pay 40,000 yuan, in response to the judge's 50,000 yuan suggestion, and the woman gave up custody of their child.

This appeared to be a triumph for the woman. The negotiation process had been painful. The father-in-law, who had the final say for his son's issues, was resolute. After several rounds of back and forth, he was only willing to increase the compensation from 10,000 to 25,000, and on the condition that the woman paid 500 yuan per month in child support. Nothing suggested that he would cave in. The patrilineal and patrilocal biases against women also placed him in an advantageous negotiating position. That is also why the initial mediation had been a stalemate.

The father-in-law might never have expected the woman to disclose the rape. This was why he had attempted to rape her repeatedly and held

such a firm position in the negotiations. He believed that she had to swallow this, in order to protect her reputation. Despite his expectations, the woman did disclose this to the judge. While the judge may not have been in the position to criminally prosecute him, she represented the public power. Indeed, it was never clear whether the father-in-law, a peasant, could tell the difference between the court and the police. For such a man, there is likely information asymmetry between what he thought a judge could do and what the law authorizes a judge to do. In his mind, a formal investigation of the judge might have put him in jail. Thus, such disclosure to the judge was intimidating enough. Under these circumstances, his best strategy was to settle as soon as possible.

Nevertheless, such a triumph was limited, due to the judge's indifference. Its net value was 15,000 yuan, and the woman had to give up custody. The woman could have gained more, had the judge been more assertive, instead of relishing on an easy solution. She did not need a police report, as analyzed before; she could have just pushed a little harder. However, she did not even fight for the original suggestion of 50,000 yuan. As mentioned, the land compensation for the woman's share had already reached 80,000 yuan, not to mention her trauma from the attempted rape and her other contributions to the family. Moreover, the man's side had the money to pay: from land compensation and the man's regular job as a lorry driver. Indeed, threatening a party with jail time is an effective tactic for a judge to strike a deal. Professor Li Su has documented a physically intimidating man who confronted his neighbor after seducing his wife.<sup>99</sup> Upon hearing a criminal threat from the court, he had been willing to increase the compensation and serve legally baseless jail time.<sup>100</sup> In practices of criminal reconciliation, similar compromises abound.<sup>101</sup>

In sum, even in those rare cases in which the victims have overcome the cultural barriers to speak out, the final outcomes are gendered due to the judges' inaction or indifference. Coming clean to the judge is not useless, but the impact is limited. The outcomes are only slightly tilted in

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99. LI SU (苏力), SONGFA XIAXIANG (送法下乡) [BRING THE LAW TO THE COUNTRYSIDE] 243–44 (2000).

100. *Id.* at 245–47.

101. Kwai Hang Ng & Xin He, *The Institutional and Cultural Logics of Legal Commensuration: Blood Money and Negotiated Justice in China*, 122 AM. J. SOCIO. 1104, 1107 (2017).

their favor. Had the judges been more assertive, the women would have been treated more fairly. The judges' modus operandi thus reinforces the gendered outcomes.

## VI. FEMALE INFERTILITY

If judges are indifferent to male impotency, how do they react to female infertility? The contrast will help illustrate the gendered outcomes. Generally, judges find this issue understandable: in most situations, the man gets what he wants. Often, men have little inhibition to make a claim and file to divorce infertile women. The judges simply endorse their rights etched into China's cultural constellation. After all, a moral, responsible Chinese woman produces a "quality" child at the right time—soon after marriage.<sup>102</sup> As Professor Lisa Handwerker notes, it is women who are invariably blamed for infertility.<sup>103</sup> Both the state's population policy and Confucian gender ideals assume that the normative female body, not the male body, is and should be fertile.<sup>104</sup>

In this case, a thirty-five-year-old man, a family's only son, sued to divorce his wife, who had recently become seriously ill.<sup>105</sup> With anasarca spread to her face, she had been too weak to finish the pre-trial conversations with the judge. Two years older than the man, she looked like his mother. After six years of marriage, they still had no children. The formal filing for divorce stated that the foundation of the affection was shaky and that there was personality incompatibility. However, the genuine reason for the divorce, as the man's legal representative stated in trial, was the woman's infertility. They had tried to treat her condition but to no avail. The man's father, on his deathbed, had nagged him to find another woman who could bear him a child. For the father, this seemed the only way to extend the lineage. The judge's brief investigation found that all of the man's family members, including his

102. JOANNA McMILLAN, *SEX, SCIENCE AND MORALITY IN CHINA* 69 (2006).

103. Lisa Handwerker, *The Hen That Can't Lay an Egg* ("Bu Xia Dan de Mu Ji"): *Conceptions of Female Infertility in Modern China*, in *DEVIANT BODIES: CRITICAL PERSPECTIVES ON DIFFERENCE IN SCIENCE AND POPULAR CULTURE* 358, 366 (Jennifer Terry & Jacqueline Urla eds., 1995).

104. *Id.*

105. Xin He, *Untitled Fieldwork* (unpublished manuscript) (on file with author). [Editorial Note: unless otherwise cited, this Part is based on the author's untitled fieldwork.]

parents, had been fond of her. After he had been laid off from a local SOE, she had supported his education in Shanghai for three years. This had qualified him to become an anesthesiologist (The Anesthesiologist' Case). She had also tended to her father-in-law for nine months in the hospital before he died. After the man had found a new job, and with his parents gone, he had initiated the divorce petition.

Helpless, the woman said to the judge, "No matter how much I did, I did not deliver an heir for their family. That is my fault. Being so ill, there is no chance for me to be pregnant. I am a burden for the family." A divorce outcome seemed both inevitable and understandable for this ill woman: "[f]or all the housework I did for the family for so many years, I only requested a place to stay after the divorce—that is, the 40 square meter apartment subsidized by his original work unit." Since the man had inherited a large apartment from his father, the case was settled soon after the man agreed to the woman's request.

As shown, to get a divorce, men usually include additional reasons for divorce, such as the incompatibility of personality, family discord, or a lack of mutual understanding before marriage. However, once the issue of infertility is brought up, both litigation parties, and other litigation participants, including the judge, all know the genuine reason for divorce. Unlike male impotency or other sex-related male conditions, which are often buried without a trace, female infertility, regarded as a physiological and more importantly, a cultural defect, is openly discussed in trial and recorded in the adjudication documents. There is no privacy. By taking this position, the judge and the court endorse the male-dominant culture.

In the above case, even though it was a first-time petition, there was no resistance for a divorce outcome. The man was not blamed for his heartless action: filing to divorce the woman when she was gravely ill, and right after he had landed a job, which, without the long-term support of the woman, would have been impossible to get. The man also made no compromises on property division. He got the large apartment, and the woman got the small one. Both apartments had been matrimonial property and should have been equally divided. The judge never raised this point in the mediation, even though the law stipulates that women

and children's property rights should be favored.<sup>106</sup> The woman was willing to accept the small one because she felt guilty for not delivering a child for the family; therefore, why bother? The woman blamed herself for not fulfilling the responsibility of continuing the lineage, and thus for the "breakdown of mutual affection." She said to the judge, "This is my fault. . . . I am a burden for the family." Internalized by this cultural bias, she had thus forgone any leverage on the issue of property division. This was why she only asked for the minimum living conditions: basic shelter.

As far as the judge was concerned, she was glad to facilitate such a settlement. Female infertility is regarded as a strong basis for the breakdown of mutual affection, thus meeting the standardized legal criteria for divorce. A divorce, even with property division favoring the man, had been a natural outcome.

## VII. CONCLUSIONS

Cultural biases, as reflected in their discourses, are an obstacle toward gender equality in court. Similarly, traditional biases against women exist in China.<sup>107</sup> As illustrated, the biases make women inhibited to speak out their sufferings. Moreover, the judges, even when women do speak out, turn a blind eye to these sufferings.

Under such a *modus operandi*, the cultural biases against women in Chinese society, especially in the rural areas,<sup>108</sup> find their ways into the judicial decision-making process and further disadvantage women's property rights in divorce litigation. These biases include, but are not limited to, patrilineal ideologies, patrilocal practices, and women's roles in issues related to sex. Ingrained in Chinese society, these biases marginalize women and are converted into diminished property rights. Consistent with the cultural biases, the judges rarely broach the issue of sex during divorce litigation. In the few exceptions in which the incidents

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106. Hunyin Fa (婚姻法) [Marriage Law] art. 2, 2001 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. at 330.

107. JOHN M. CONLEY & WILLIAM M. O'BARR, RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE 12 (1990).

108. JUDITH STACEY, PATRIARCHY AND SOCIALIST REVOLUTION IN CHINA 237 (1983). As Professor Judith Stacey argues, one of the consequences of the socialist reforms is that urban family life has significantly been less patriarchal than in rural China. *Id.* at 240. The traditional culture's impact on the divorce litigation shall also be less visible in urban China. *Id.*

are revealed to the court, the judges brush them off. Suffering from this sexual bias in court, women fail to make their claims, and thus receive less property or compensation than they deserve. Another layer of gendered outcomes is perpetuated.

Judges' inaction and indifference toward issues related to sexual problems are consistent with their behavior patterns towards domestic violence.<sup>109</sup> After all, male impotency and rape are also damages. The difference is that the laws do not explicitly provide protection against male impotency.<sup>110</sup> Due to the incentive constraints, the judges are even more reluctant to take action for male impotency than for domestic violence.<sup>111</sup> This is why we have witnessed the penetration of cultural biases.

Their indifference and inaction also perpetuate the gendered outcomes, since these revelations do not make a difference in the litigation process: the victims are more reticent, unwilling to share their suffering with the judges. Furthermore, turning a blind eye to these inflictions has ripple effects outside the courts. When rural women go to great lengths to seek legal assistance for marital rape, Li found that legal workers only state "what he did was lawful."<sup>112</sup> Li argues that the legal workers could help the victim make a claim based on personal injury, even if marital rape is exempted under Chinese law.<sup>113</sup> However, even if the claims had been presented to the court, the judge would have asked: what is the evidence? The inflictor would be even more confident because the issue is usually difficult to prove. Ultimately, it is the judge's behavior that shapes legal workers' approaches. If the judges had been proactive in protecting women's interests, the lawyers may also have changed their behavior accordingly.

As Professor Catharine MacKinnon argues, only when the judges act can equality promises be invoked.<sup>114</sup> To reduce gendered outcomes, an important step would be to reveal the imbalance and unfairness resulting from judicial implementation of the gender-neutral principles and

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109. He & Ng, *supra* note 8, at 112–13.

110. Hunyin Fa (婚姻法) [Marriage Law] art. 10, 2001 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. at 331.

111. He & Ng, *supra* note 8, at 99.

112. Li, *supra* note 84, at 170.

113. *Id.*

114. MACKINNON, *supra* note 48, at 239.

rules.<sup>115</sup> Focusing on the courts' institutional constraints, this Article offers an alternative reform agenda. An immediate remedy to reduce gendered outcomes in the litigation process would be to adjust how the judges are assessed. A fundamental approach is to alienate the bureaucratic and political concerns from the legal goals embedded in the judicial process.

First, the use of mediation should be more cautious. As demonstrated, the pursuit of a high mediation rate has been the major source of gendered outcomes.<sup>116</sup> Despite its positive functions, mediation trivializes domestic violence, sacrifices women's rights to child custody, and ignores cultural and economic biases against women. Mediation also allows, and even encourages, the trade-off between divorce and child custody and property; it is the platform and the conduit to perpetuating gender inequality. In common law jurisdiction, mediation is used to settle family disputes, but its role is limited.<sup>117</sup> In light of China's practices, there is a reason for this limited role.<sup>118</sup>

Eliminating all mediation from divorce cases may be unrealistic. Due to the intimate relationship between litigants in family cases, in 2015 a nationwide "family cases trial reform"<sup>119</sup> sought to preserve and reconcile marriages through intensive *mediation*. The courts in Gansu Province, for example, "push for reconciliation and not divorce."<sup>120</sup> Guangdong High Court stresses the priority of mediation and the set-up of mediation before the hearing in family cases.<sup>121</sup> In reality, however,

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115. *Id.* at 248.

116. Kwai Hang Ng & Xin He, *Internal Contradictions of Judicial Mediation in China*, 39 L. & SOC. INQUIRY 285, 299 (2014).

117. Weixia Gu, *Civil Justice Reform in Hong Kong: Challenges and Opportunities for Development of Alternative Dispute Resolution*, 40 H.K.L.J. 43, 45–46 (2010).

118. *Id.* at 46.

119. Wang Zhihui (王智慧), *Duoyuan Huajie Jiating Hunyin Maodun Jiufen—Dingxi Liangji Fayuan Jiji Tuijin Jiashi Shenpan Gaige* (多元化解家庭婚姻矛盾纠纷—定西两级法院积极推进家事审判改革) [*Alternative Resolution on Family and Marriage Disputes—The Two Levels of Court in Dingxi City Promote Family Judicial Reform*], HIGH PEOPLE'S CT. GANSU (Apr. 3, 2019, 9:29 AM), <http://www.chinacourt.gov.cn/Show/33164>.

120. *Id.*

121. *Guangdong Fayuan Shenli Lihun Anjian Chengxu Zhiyin* (广东法院审理离婚案件程序指引) [*The Guidelines of Divorce Cases Adjudication Procedures in*

some courts in the more developed areas have deepened the division of labor in the courts due to caseload pressure: the judges adjudicate while non-adjudicating personnel mediate. Some interviewed judges suggested that the role of mediation had declined in their courts. Different trajectories notwithstanding, mediation will likely persist in China's family law practices.

As long as mediation is still allowed in divorce proceedings, judges should inform litigants of its gendered implications before they accept a settlement. Judges should also inform the victims that domestic violence will not be factored in mediation. A fundamental step would be to once and for all bar mediation for cases involving established domestic violence. Judges should warn the litigants that in mediation, their rights may be traded for consent to divorce. The judges should also determine child custody independent of other concerns, rather than use it as a bargaining chip. For sex-related issues, the judges should inform the litigants of the pros and cons of disclosing them in the hearing, as opposed to in mediation.

Second, the courts should be more cautious when pursuing efficiency. Given the explosion of caseloads in many courts, there is a pressing need to process cases efficiently. Such a pursuit, however, is often realized at the expense of women. Bidding for the conjugal apartment is one example. The divorcing parties need to be informed of the pitfalls when choosing bidding as a way to divide their apartment. When one party is short on cash, bidding may not be in their best interests, even if a market appraisal costs.

Third, judges' gender consciousness, despite its improvement, still needs enlightenment. While the SPC Guidelines already required judges specialized in divorce cases to receive at least twelve hours for gender education and eighteen hours for domestic violence,<sup>122</sup> it is unclear whether the requirements have been implemented. Many judges do not even realize that their approaches are gendered. Furthermore, when they are inundated in the institutional concerns, they may lose sight of the

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*Guangdong Courts*], HIGH PEOPLE'S CT. GUANGDONG PROVINCE (Oct. 3, 2018, 8:51 AM), <http://www.gdcourts.gov.cn.index.php?v=show&cid=124&id=51645>.

122. Sheji Jiating Baoli Hunyin Anjian Shenli Zhinan (涉及家庭暴力婚姻案件审理指南) [Guidelines for Hearing Marriage Cases Involving Domestic Violence] (promulgated by Sup. People's Ct., Mar. 2008, effective Mar. 2008), art. 20, <https://pkulaw.com/chl/b001df0ee5c6c01abdfb.html>.

cultural and economic biases against women, as shown in the cases related to patrilocal, patrilineal, bride-price, and sexual issues. More gender consciousness training is needed, in addition to replacing the current institutional concerns with concerns that prevent gender biases.