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Why Don't Chinese Divorce Courts Better Protect Women?

Efficiency and stability matter more

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Why do so many Chinese women suffer or even die from domestic violence? Why are personal safety protection orders rarely issued? Why are women still at a disadvantage in Chinese divorce courts when property is divided and child custody is awarded? Why are the laws protecting women's rights not well implemented?

Based on extensive fieldwork and interviews in various court settings over more than a decade, I argue that institutional constraints to which Chinese judges are subject, a factor largely ignored by the existing literature, play a crucial role in generating outcomes unfavorable to women. The bureaucratic incentives of the court distort the implementation of the divorce law. Judges are responding to two sets of interrelated institutional constraints: efficiency concerns and stability concerns.

Efficiency concerns mean that judges are supposed to handle cases swiftly. The Civil Procedural Law stipulates that cases tried using

“normal procedures” are to be completed within six months, and those tried with “simplified procedures” have only three months to finish. Some senior officials managing their courts even shorten the limits to 90 or 20 days, respectively, to allow themselves more room to maneuver. The case closure rate, an indication of the effectiveness and efficiency of court operations, appears in every court's annual work report and can affect the leaders' promotions.

Stability concerns require that the court's decision be accepted by the divorcing parties and society at large—it should not foment social instability. Acceptance is measured by the appeals rate, the remand rate, the petition rate, and the number of malicious incidents, such as social protests and deaths. The judiciary trumpets a slogan: “To achieve the combination of both legal and social effects.” While the phrase “legal effects” suggests compliance with legal principles and rules, “social effects” implies 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.

Due to these concerns, judges often choose the most efficient yet safest way to handle issues in divorce litigation. They have to make sure that cases are finished before their deadline and without malicious incidents. They want a decision acceptable to both parties that does not provoke extreme reactions. As far as the divorce decision is concerned, courts often deny an initial petition, but grant divorce in subsequent petitions. They invariably deny divorce petitions in which one party refuses to be divorced, making death threats or other actions threatening social stability. Mediation is also preferred. This judicial

behavior pattern, I argue, results in gendered outcomes.

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First, many laws protecting women's interests are not fully implemented. These laws are created to reverse social, cultural, and economic biases against women. They are not necessarily gender-neutral. They may favor women, for example, by giving women custody of children two years old or younger. Implementing such rules is crucial for rectifying gender biases and eventually achieving gender equality. Due to judges' concerns, however, domestic violence confirmed at the trial level is often erased, dismissed, or ignored at the appeals level. This occurs because the appeals court needs to strike a balance. The judicial protection order, intended to help victims of domestic violence before the litigation process ends, has been underutilized because issuing such orders increases judges' workloads. Child custody turns into a bargaining chip to soothe unsatisfied men. Children are taken away from women simply because men are viewed as posing a more imminent threat to social stability.

Second, the judges' behavior patterns privilege men in litigation outcomes due to their superior economic capabilities. For example, one option the law provides for disposing of the family home is for each of the husband and wife to "bid" how much they are willing to pay to buy the other person's share. The highest bidder gets to buy the other one out, often at less than the market price. Judges can order an appraisal to discover the market price, but often encourage litigants to engage in bidding because it is the most efficient way to fix a price for the matrimonial property. As a result, many women lose their homes (and are

under-compensated for them). Out of stability concerns, judges also often allow an economically superior man to gain an upper hand in highly contested cases. Men with more cash are allowed to buy out women determined not to be divorced. Women with less economic capacity do not enjoy the same luxury when their husbands are equally steadfast against divorce. Women remain ensnared in the marriage shackles, even though they are desperate for their removal.

Judges do not alleviate cultural biases against women – rather, they perpetuate them.

Finally, judges do not alleviate cultural biases against women—rather, they perpetuate them. They accept the patriarchal culture and reinforce gender inequality, turning a blind eye to cultural bias. Because of their concerns for efficiency and stability, they are reluctant to explore women's reports of suffering from their husbands' impotency, or even rape committed by a member of their husband's family. This is not because the judges are unaware that women's rights are being infringed. They just do not want to infuriate or even confront the men. For their purposes of disposing of cases efficiently without lingering effects, it's simply not necessary.

It is thus inadequate to say that women's poor outcomes in divorce litigation stem only from legislative shortcomings such as incomplete coverage of women's rights or vague definitions of key terms. It is also not enough to blame the judges' lack of gender consciousness, or inequalities and biases outside the court. Rather, judges, catering to institutional concerns, both consciously and unconsciously make decisions detrimental to women. Driven by these concerns, judges allow the forces of inequality in social, economic, cultural, and political areas to

infiltrate their decisions. Institutional factors are what prevent the judges from offering a level playing field for women. Equality can only be achieved when courts act. Their institutional failure to enforce the laws has become a major obstacle to gender justice.

Despite the renewed and heightened focus on the rule of law in the official discourse in China and the awakening gender consciousness in society, implementing the laws on gender equality in China remains difficult. One source of resistance comes from the judiciary, the institution that is supposed to implement the laws. This is largely because of the incentives judges face to prioritize efficiency and stability. Further efforts to improve gender equality must alter these incentive mechanisms.

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