CHAPTER TWO

THE RIGHT TO DECOUPLE

In this chapter, I provide a schematic overview of sources of law pertaining to the right to divorce, evidentiary standards, legal procedures, and how they are double-edged swords used to deny gender justice. Chinese law is replete with ambiguities and inconsistencies that enable almost limitless judicial discretion to deny legally deserving divorce petitions and to ignore domestic violence allegations (J. Zhang 2018).

As a primer on Chinese laws governing the divorce process, this chapter lays the groundwork for an assessment of how and how well China's courts implement those laws. Chinese judges arrive at their decisions not by applying case law, but rather by applying relevant legal provisions to the facts of a given case. As part of the civil law tradition, China's legal system operates not according to legal precedent at the center of Anglo-American common law systems but rather according to statutes enacted by China's legislature (the National People's Congress), rules and regulations promulgated by China's administrative agencies (ministries under the State Council), and judicial interpretations and opinions issued by the SPC, all of which carry the full force of law (Finder 1993; Hsia and Johnson 1986).[1] Judges' textual interpretations of the foregoing legal sources are hardly neutral, thanks to the judiciary's subordination to state interests and political priorities – a key defining feature of "rule by law" (Moustafa

[1] China's modern legal system was adapted from the civil law tradition of continental Europe in general and Germany in particular, via the influence of both Japan at the end of the Qing Dynasty and the Soviet Union in the 1950s (Xin 1999:319, 356, 473, 499–500).

2014) and "authoritarian legality" (Gallagher 2017; Solomon 2010) common to many illiberal political contexts. Judicial decision-making in China is colored generally by the strong civil service character of courts in civil law countries (Biland and Steinmetz 2017) and particularly by China's Leninist legacy of "socialist legality" (Baum 1986; Shih 1996).

Laws, rules, and judicial interpretations provide grounds on which judges can grant unilateral divorces and give women who cannot prove their domestic violence allegations the benefit of the doubt. At the same time, however, they provide judges with legal pretexts for denying divorce petitions even in cases involving domestic violence.

OVERVIEW OF RIGHTS

China is a poster child for laws protecting gender equality and the freedom of divorce. Following the establishment of the People's Republic of China in 1949, the first body of law enacted by the new government was the 1950 Marriage Law, which enshrined the principles of gender equality and the freedom of marriage based on love and consent, and which became a key weapon in early campaigns targeting arranged marriages, bride-buying, polygamy, concubinage, close cousin marriage, and other "feudal" marital practices (Diamant 2000b; Johnson 1983; Parish and Whyte 1978:158). The principle of the freedom of divorce has been an inextricable part of the principle of the freedom of marriage (Huang 2005; Li 2001:6), and facilitated a surge of divorces in the early 1950s, peaking at over one million in 1953 (Tsui 2001:110). Article 49 of China's Constitution and Article 103 of China's General Principles of Civil Law both explicitly prohibit any violation of or interference with the freedom of marriage.

In the time since the 1950 and 1980 versions of the Marriage Law, neither of which explicitly addressed domestic violence, legal provisions promoting gender equality in general and protecting victims of domestic violence in particular have emerged in a dizzying number of national laws in China, including the Constitution, the General Principles of Civil Law, the Civil Procedure Law, the Criminal Law, the Criminal Procedure Law, the National Security Law, the Law on the Protection of Women's Rights and Interests, the Law on the Protection of the Rights and Interests of Minors, the Law on the Protection of the Rights and Interests of the Elderly, and the Law Protecting Disabled Persons, not to mention national and local administrative regulations,

measures, resolutions, notices, and circulars as well as SPC interpretations, opinions, instructions, and written replies to requests for guidance from lower courts – all of which generally have the force of law (Alford and Shen 2004:242; Chen and Duan 2012; Jiang 2016; Rong 2016; Runge 2015:34; H. Zhang 2012; Zhao and Zhang 2017:194–95). According to the 2008 Guidelines on Judging Marital Cases Involving Domestic Violence (hereafter, "the 2008 Guidelines"), published by the SPC's research arm, the China Institute of Applied Jurisprudence, "China has over 69 local laws and regulations to prevent, stop, and prohibit domestic violence" (Article 16). Its preamble reflects the strength of China's embrace of global norms of gender equality:

> Important instructions from Party and state leaders concerning "attaching importance to the protection of women's rights and bringing about gender mainstreaming" and "advancing gender equality and realizing common development," the emphasis of leaders of the Supreme People's Court on gender equality and judicial fairness, and policy documents from other relevant state agencies and social organizations on the implementation of principles of equality stipulated by the Constitution all provide policy support to these Guidelines.

The term "domestic violence" (家庭暴力) made its debut in Chinese law in the third and final version of the Marriage Law amended in 2001. It introduced several provisions related to domestic violence, including Article 46, a mechanism for claiming civil damages (Chen and Shi 2013; Chen, Shi, and He 2014; Chen, Shi, and Zhang 2016; Yang 2016). Article 46 is essentially preserved as Article 1091 in the 2020 Civil Code that took effect on January 1, 2021, superseding not only the Marriage Law but also the Inheritance Law, the Adoption Law, the General Principles of Civil Law, the Property Law, the Tort Law, the Guarantee Law, and the Contract Law. Although the 2001 Marriage Law and the 2020 Civil Code prohibit and punish domestic violence, they contain no clear definition of what constitutes domestic violence. This shortcoming was quickly remedied in the 2001 Interpretations of the SPC on Several Issues Regarding the Application of the Marriage Law (Li and Friedman 2016:156; H. Zhang 2014:225). Its definition of domestic violence includes "beating, tying-up, maiming and restricting personal freedom (for example by the use of force) such that mental or physical harm results" between spouses or between a spouse and a family member such as a child or parent-in-law (Article 1; Palmer 2007:683; also see

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Cheng and Wang 2018:254–55). The 2005 amended version of the 1992 Law on Protecting the Rights and Interests of Women added a provision prohibiting – and requiring government agencies and grassroots mass organizations to prevent and combat – domestic violence against women (Article 46).

The 2008 Guidelines further clarified the SPC's definition of domestic violence and brought it into alignment with international definitions of violence against women by including "actions between family members, but primarily between spouses, in which one side uses physical coercion, verbal degradation, economic control, or other means to carry out a violation of the other side's physical, sexual, psychological, or other rights of the person for the intended purpose of controlling the other side" (Article 2; H. Zhang 2014:226). Indeed, the 2008 Guidelines cite by name and quote directly from the United Nations 1993 Declaration on the Elimination of Violence against Women and the 2006 Secretary-General's In-Depth Study on All Forms of Violence against Women. One of its eight chapters is devoted to personal safety protection orders. The 2008 Guidelines even stipulate, "People's Courts may summon expert witnesses at the request of a litigant or on their own authority to explain the defining characteristics and unique patterns of domestic violence, including battered spouse syndrome. When necessary, experts may be questioned by judges and litigants on both sides. An expert opinion may be used as an important reference source in judicial rulings" (Article 44). We will see in Chapter 9 that Chinese courts, no different from courts in the United States and elsewhere (Fair 2018; Paradis 2017), do include expert witness testimony on battered woman syndrome in cases of women who killed their abusive husbands.

China had signaled its commitment to combatting domestic violence long before 2001. In February 1994, in preparation for 1995 World Conference on Women in Beijing, China's government submitted to the United Nations a report on the central document that emerged from the previous World Conference, namely the 1985 Nairobi Forward-Looking Strategies for the Advancement of Women. The Chinese report points out that "the elimination of all forms of violence against women is necessary to strengthen and advance China's social stability, and also to protect women's human rights." It also promises "gradually to improve the system of specialized, preventative, and administrative laws and regulations to eliminate violence against women as well as the system of enforcement and supervision" (Rong

2016:203–04). Following the Beijing conference, China along with over 180 other countries adopted the 1995 Beijing Declaration and the Platform for Action, in which violence against women is one of 12 "critical areas of concern" (Htun and Weldon 2018:63).

The 2008 Guidelines also urge courts to grant divorces when the legal standard for domestic violence is satisfied:

> The freedom of marriage includes both the freedom of marriage and the freedom of divorce. Marriage requires the mutual consent of both people, whereas divorce requires only that one person make a request that satisfies the conditions for divorce. The People's Court will not protect the freedom of marriage at the expense of neglecting the protection of the freedom of divorce. When one involved party initiates divorce litigation, the People's Court should grant the divorce through mediation or adjudication provided there are statutory grounds for divorce and mediation by a people's court failed to achieve marital reconciliation. Under circumstances in which the occurrence of domestic violence has been affirmed and one of the parties insists on divorcing, regardless of whether the petitioner is the offender or the victim, the People's Court should respect the party's desire, uphold the principle of the freedom of marriage, and grant the divorce as quickly as possible by mediation or adjudication in order to prevent the aggravation of violent injuries caused by a delay and lack of resolution. … Even if a minority of such divorces resulted from people's rash decisions made impulsively, as adults they should accept responsibility for their actions. (Article 17)

As we will see, however, courts tend to do the opposite of what these guidelines prescribe. Judges sometimes fear that *granting* divorces may aggravate domestic violence and lead to "extreme incidents" such as murder and suicide (He 2017). Moreover, judges can and do disregard these guidelines because, as stated in the preamble, they are provided only for reference purposes to trial judges, lack the force of law, and thus cannot be the legal basis for court rulings (Deng 2017:109).

China's 2015 Anti-Domestic Violence Law, which took effect in March 2016, brings together and elaborates legal protections, including provisions on personal protection orders, previously scattered across a number of bodies of law, administrative regulations, and SPC interpretations. Indeed, it absorbed 12 out of all 38 articles of the 2008 Guidelines (Pan 2018). Although this law does not explicitly address divorce, it – like earlier laws, including Articles 100 and 154 of the 2012 Civil Procedure Law (which appeared as Articles 92 and

140 in the 2007 version) – gives women who want to separate from their abusive husbands the right to apply to courts for protection orders.[2]

Chinese law provides multiple grounds for divorce. Statutory wrongdoing, also known as "faultism," constitutes grounds for divorce. Physical separation can be grounds for divorce. A defendant's failure to respond to a public notice when his whereabouts are unknown is also grounds for divorce. Above all, the breakdown of mutual affection, also known as "breakdownism," is grounds; and consequently, judges assess the quality of the marital relationship and potential for reconciliation.

BREAKDOWNISM

In comparative historical perspective, China was a legal trailblazer in terms of liberal no-fault divorce standards. China's laws on the books have always allowed divorce when only one spouse wants it. China's 1950 Marriage Law stipulated: "If either husband or wife insists on divorce, the divorce will be granted when the district-level people's government and judicial organs fail to achieve marital reconciliation" (Article 17). The Chinese right to a unilateral ex parte divorce on grounds of "irreconcilable differences" has even deeper roots in the short-lived 1931–1937 Chinese Soviet Republic, which modeled its divorce laws on those of the Soviet Union, and predates the rise and spread of Western no-fault divorce by several decades (Chen 2005a:154, 156; Huang 2005:175).

Following a national campaign to enforce the Marriage Law in the early 1950s, however, the freedom of divorce became notoriously difficult to realize. Countervailing against the freedom of divorce were official concerns about its abuse and concomitant policies intended to discourage and limit its exercise. The call to "oppose" or "prevent frivolous divorce" (反对轻率离婚 or 防止轻率离婚; Chen 2005a; Ma and Luo 2014:39; Zhang 2009:28), which reverberates to this day, was justified by the work of Marx and Engels, and by Lenin's famous quip that "it is not at all difficult to understand that the recognition of the right of women to leave their husbands is not an invitation to all wives

[2] The use of these provisions for this purpose is explained both in the 2008 Guidelines and Liu (2013:79). Also see Runge (2015:37–38).

to do so!" (Liang 1982:19). The Chinese novel *Waiting* (Jin 2000) is frequently cited to illustrate a "legal system that substantively provides for the freedom of divorce but procedurally prohibits it" (Woo 2001; also see Alford and Shen 2004:250; Honig and Hershatter 1988:206; Huang 2005:187). This narrative of the Sisyphean challenge of divorce throughout the Mao era, although not entirely without challenge (Diamant 2000b, 2001), remains dominant (Honig and Hershatter 1988; Huang 2005; Johnson 1983; Stacey 1983; Wolf 1985). Despite a provision in the 1950 and 1980 versions of the Marriage Law (Article 17 and Article 24 respectively) requiring that divorce certificates be issued "without delay" (应即发给离婚证) when all legal conditions for divorce were satisfied, courts routinely denied divorce petitions or dragged out the process for years (Tsui 2001:108; Whyte and Parish 1984:150–51, 187).

Forces outside the Marriage Law undermined the realization of the freedom of divorce. Later in 1950, the Legal System Committee, under the now-defunct Government Administration Council of the Central People's Government, promulgated Answers to Several Issues Regarding the Implementation of the Marriage Law, which provided a condition under which courts could deny divorce petitions: "A divorce judgment should be rendered if there is a legitimate reason why marital relations cannot continue, otherwise a judgment denying the divorce may also be rendered" (Chen 2005a:154; Li 2001:7). Both the Legal System Committee's 1953 Answers to Questions about Divorce and the SPC's 1963 Opinions on Several Issues Regarding the Implementation and Enforcement of Civil Policies reaffirmed a court's ability to deny a divorce petition even if mediated reconciliation efforts failed, provided the court determined that the couple had not yet reached the point where life together was truly unsustainable (1953) or that marital relations (夫妻关系) and marital affection (夫妻感情) had not completely broken down beyond any hope of reconciliation (1963) (Chen 2005a:154–55; Li 2001:7). Judicial workers charged with deciding whether to grant divorce requests were reportedly vexed by the SPC's lack of clarity: "The rules looked like rules but at the same time were not rules; because they were ambiguous and cut both ways, were hard to get a handle on in judicial practice, and supported granting or denying the same divorce petition, judgments were inconsistent" (Chen 2005a:155). Legal ambiguity persists to the present day owing to multiple, competing standards for divorce against the backdrop of political and ideological pressures.

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Animating China's history of family law legislation and practices over the past century are unresolved tensions between efforts to promote gender equality through the protection of divorce rights, and socialist morality and the legacy of Confucian family values. China's oxymoronic approach to divorce endeavors to "protect the freedom of divorce and prevent frivolous divorce" (Ma 2006:23; Ma and Luo 2014:39; W. Zhou 2018). The "freedom of marriage" is invoked in different ways. It often refers to the freedom of divorce. It is also a euphemism for marital preservation. Du Wanhua (杜万华), for example, a high-ranking member of the SPC's adjudication committee until the end of 2017, said in an interview: "In order to preserve family stability, should we get rid of the freedom of divorce and say marriages cannot end? Of course not. The freedom of marriage includes both the freedom to marry and the freedom to divorce. In order to maintain the stability of marriage and family we must also protect the freedom of marriage" (Wang and Luo 2016). In China, maintaining family stability through marital preservation is a political tool for maintaining social stability writ large (Chapter 3).

Although mutual consent has never been an absolute condition of divorce in any Chinese law, in practice it remains a virtual sine qua non of divorce, thanks to this legal test based on the current extent of – and future potential for – marital affection and love, known as "breakdownism." The 1980 Marriage Law removed the required step of extra-judicial mediation; those seeking to divorce could now go straight to court. At the same time, however, modeled after the standard I have already discussed in the earlier 1963 SPC Opinions, the "breakdown of mutual affection" (感情破裂) standard was added to the 1980 Marriage Law (Article 25). It remains in the 2001 version (Article 32) as well as the 2020 Civil Code (Article 1079) as follows: "If one party alone desires a divorce, the organization concerned may carry out mediation or the party may appeal directly to a People's Court to start divorce proceedings. In dealing with a divorce case, the People's Court shall carry out mediation; in cases of complete breakdown of mutual affection, and when mediation has failed, divorce should be granted."

By removing a burdensome extrajudicial mediation requirement and adding a variant of standardized global no-fault "irreconcilable differences" tests, the 1980 Marriage Law's breakdownism (破裂主义) appeared to lower barriers to divorce. Indeed, that was its original intent. As the deputy chair of the committee responsible for drafting the 1980 Marriage Law explained, forcibly preserving marriages

"would only cause those involved to suffer, even for the contradictions to sharpen, and result possibly in homicides" (Huang 2005:186).

Paradoxically, however, breakdownism has also served to support the deep legislative spirit of "preventing frivolous divorce." The Marriage Law's promise of unilateral no-fault divorce was neutralized by its requirement that courts first determine whether a marriage is dead or viable. Chinese courts are distinguished by the wide discretion they wield to assess the extent and quality of marital affection. The legislative intent of the breakdownism standard was to allow "the courts both to loosen divorce requirements for those couples whose relationship offered no hope for reconciliation and to tighten them for spouses who sought divorce out of momentary anger" (Huang 2005:187). In practice, however, judges routinely rule that any marriage in which one party does not want to divorce has hope for reconciliation and therefore fails to meet the breakdownism standard – at least on the first filing (S. Guo 2018:113; Xu 2007:204; W. Zhou 2018).

Judges exercise enormous discretion and make arbitrary rulings when applying abstract, unmeasurable components of the breakdownism standard (Ma and Luo 2014:35). In 1989, to provide guidance to judges, the SPC promulgated Several Concrete Opinions on How to Determine in Divorce Trials Whether Marital Affection Has Indeed Broken Down, also informally dubbed the "Fourteen Articles" because it contains a list of 14 standards (Chen 2005a:155; Huang 2005:156; Li 2001:8). These opinions require that judges assess "the marriage's current condition and reconciliation potential" (有无和好的可能; Xu 2000).[3] Rather than offering clarity, the Fourteen Articles extended existing ambiguities by requiring judges to rule on divorce petitions according to unknowable, hypothetical future counterfactuals (Alford and Shen 2004:251; Chen 2005a:155).

> Holdings in adjudicated divorce decisions are extremely flexible, giving the law considerable room for the application of common sense. … Whether or not there is reconciliation potential is the key reason for granting or denying a divorce. This is reflected in the following: First, when courts determine that there is reconciliation potential, they will deny the divorce petition. There can be no situation in which a court will affirm reconciliation potential and then grant a divorce. Second, if a couple in divorce litigation had previously reconciled through

[3] A "lack of reconciliation potential" appears in both the preamble and three of all 14 articles.

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> mediation and continued living together, the judge will often try to mediate again and then deny the divorce petition if mediation is unsuccessful. The reason for this is that judges can use previous reconciliation experience to form their judicial determination that the marital relationship can be reconciled. Whether there is reconciliation potential is entirely a matter of judicial discretion about – and a judicial determination of – the condition of a couple's mutual affection. For these reasons, both legal provisions and judicial discretion leave room for two or more divorce petitions from the same couple. (Jiang and Zhu 2014:82–83)

Scholars have widely decried the practical application of the breakdownism test as a "backward step" (倒退) and an unlawful assault on the freedom of divorce (Alford and Shen 2004:244–45, 252; Jiang 2009a:67; Ma 2006; Xu 2007; Yi and Tong 1998).

Mutual consent is often enough to establish the breakdown of mutual affection. Defendants sometimes (albeit rarely) agree on the divorce itself, even if they challenge its terms. According to Article 31 of the Marriage Law, a divorce should be granted if both sides want out. More often than not, judges take mutual consent as evidence of the breakdown of mutual affection and grant the divorce on these grounds (Jiang 2009b:19; Luo 2016:16). Judges, however, may also deny a divorce petition even when the defendant consents if they deem the case to be "frivolous" or "impulsive." They may also suspect the couple is conspiring to get a "fake divorce" and then to remarry after achieving their illicit goal of escaping debt, circumventing restrictions on the purchase of real estate, evading family planning policies, or receiving more housing demolition compensation (Cai and Qi 2019; Fu and Wang 2019; Jiang 2009b:19; Tan and Wang 2011). Most divorce fraud, however, occurs outside court in the Civil Affairs Administration (Min 2017:179).

FAULTISM

The breakdown of mutual affection can also be established on faultism grounds of statutory wrongdoing (过错主义; Ma and Luo 2014). Marital affection should be regarded as having broken down if any of the 14 standards itemized in the 1989 Fourteen Articles is met and the plaintiff insists on a divorce. The 14 breakdownism standards include sexual dysfunction, mental illness, "bride-buying" (买卖婚姻, also translated as "mercenary marriage"), and various forms of marriage fraud. Strictly speaking, not all of the 14 conditions on the

list constitute wrongdoing. In addition to breakdownism and faultism, a third Chinese divorce standard is "purpose-ism" (目的主义). According to this standard, a divorce should be granted if one side wants it and marital conditions prohibit the realization of a primary purpose of marriage. According to one legal scholar, China's legal standards governing court judgments on divorce petitions have transitioned from a "simple breakdownism" (单一破裂主义) to a "complex breakdownism" (复合破裂主义) that also encompasses faultism and purpose-ism (Xue 2014:16).

Although a court will grant a divorce only when it holds that mutual affection has broken down, statutory wrongdoing and purpose-based standards can be the basis of such a holding. Any form of bad behavior listed in the Fourteen Articles should automatically satisfy the breakdownism test. If a court affirms the occurrence of statutory wrongdoing, marital affection, legally speaking, has broken down. Conspicuously absent from the 14 fault-based standards is domestic violence. As mentioned earlier, the term "domestic violence" first appeared in the 2001 Marriage Law. Only in the 2008 Guidelines is domestic violence framed as an issue of "coercive control" in accordance with global rights discourse and global legal norms. Prior to 2001, the words "maltreatment" (虐待) and "abuse" (侮辱) were generally used to refer to violence against women and children. Every version of the Marriage Law refers to the maltreatment and desertion of family members, as do the Fourteen Articles and the Public Security Administrative Punishments Law.

In the Fourteen Articles, the modifier "truly" or "indeed" (确已) was added in front of "broken down": "mutual affection has indeed broken down" (感情确已破裂). This new language was incorporated into the 2001 Marriage Law and preserved in the 2020 Civil Code.[4] In their written court decisions, judges often use variants of a similar but even more restrictive modifier: "completely" (彻底 or 完全). Although the breakdownism test may appear to impose a higher bar than in the past

[4] In the legislative process of amending the 1980 Marriage Law, some legal scholars advocated in vain for replacing "mutual affection has indeed broken down" with "marital relations have indeed broken down" (婚姻关系确已破裂). Such efforts to lower barriers to no-fault divorce were unsuccessful (Ma 2006:23; Ma and Luo 2014:38). Much of the history of divorce-related lawmaking in China has been animated by debates between advocates of the prevailing "breakdown of mutual affection doctrine" (感情破裂说) and advocates of a more liberal alternative "breakdown of marital relations doctrine" (婚姻关系破裂说) (Chen 2007:396; Luo 2016:14; Ma and Luo 2014; C. Xu 2012:42).

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by virtue of the "truly" modifier, the various breakdownism standards in this body of law are nonetheless, in writing at least, far from insurmountable. In addition to reaffirming the earlier unilateral no-fault test of breakdownism (provided that the court first fails to achieve mediated reconciliation), it also incorporates and supplements some of the standards in the Fourteen Articles by itemizing three fault-based standards for unilateral divorce, namely, (1) bigamy or cohabitation with a third party, (2) domestic violence, or (3) chronic gambling, drug use, or other "odious and incorrigible habits" (恶习屡教). Article 32, Item 2 of the 2001 Marriage Law – and Article 1079, Item 2 of the 2020 Civil Code – stipulates that a court should grant a divorce request when any of these three itemized fault-based standards is satisfied and mediation fails. If a court affirms one of these forms of wrongdoing, it is supposed to view marital affection as having broken down.

Marital violence, regardless of which side is at fault, automatically establishes the breakdown of mutual affection and therefore should, according to this legal test, oblige courts to grant a unilateral divorce request (W. Chen 2013; Li, Liu, and Yang 2013:35; Ma 2006:24). Indeed, the 2001 Interpretations of the SPC on Several Issues Regarding the Application of the Marriage Law stipulates that judges' impulse to preserve marriages on the basis of breakdownism should be trumped by the requirement to grant divorces on the basis of faultism: "In divorce cases that 'should be granted' according to the conditions stipulated by Article 32, Item 2, a divorce request should not be denied when a litigant has committed wrongdoing" (Article 22; Cui 2015:184; Jiang 2009b:18). As we will see, however, China's fault-based legal standards are rarely used in practice to grant divorces even when claims of wrongdoing are supported by evidence and affirmed by judges.

A fundamental tension between protecting the rights of women and protecting the institution of marriage animates divorce litigation. Legal ambiguity enables judges to support the latter at the expense of the former. The scope and definition of domestic violence are limited and vague (H. Zhang 2012:51). For example, in the SPC's 2001 Interpretations cited earlier, the same article that defines domestic violence contains an additional sentence: "Domestic violence that is persistent and frequent [持续性、经常性] constitutes maltreatment" (Article 1; Palmer 2007:683). The absence of a clear definition of either "persistent" or "frequent" has given judges latitude to hold that spousal battery does not constitute domestic violence if it happened only once or rarely, and was thus neither persistent nor

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frequent (Chapter 7). As we will see later in this chapter, vague and competing standards of evidence create additional space for judicial discretion.

JURISDICTIONAL STANDING

Each county, county-level city, and urban district in China has one regular basic-level people's court. Plaintiffs, upon filing their petitions, are required to satisfy jurisdictional standing requirements. This means a court can consider a plaintiff's petition only if it has jurisdiction over the matter. A plaintiff must furnish a marriage certificate to prove she is lawfully married to the defendant.[5]

The Civil Procedure Law stipulates that court petitions should, under most circumstances, be filed in the defendant's place of residence (Article 21), which practically speaking usually means where the defendant's household is registered (place of *hukou*, 户口 or 户籍) and which, in the case of divorce, is usually also the plaintiff's place of residence. Plaintiffs filing first-attempt divorce petitions are, by and large, tethered to the basic-level courts in the counties, county-level cities, or urban districts of their officially registered residential addresses. Ke Li (2015a:98) reported that migrants from rural areas rarely file their divorces in urban courts: "due to jurisdictional restrictions, rural women who serve as migrant workers in cities and towns must return to their hometowns to file divorce petitions." The 2015 Interpretations of the SPC on the Application of the Civil Procedure Law provides the option for litigants who have been residing outside their place of *hukou* registration for over one year to file a divorce petition in their actual place of residence (Article 12). In practice, however, this right is rarely actualized (Chapter 4).

CIVIL PROCEDURES AND ASSIGNING JUDGES

Courts adjudicate divorce petitions according to one of two civil procedures: ordinary (普通程序, sometimes translated as the "normal procedure") or simplified (简易程序, sometimes translated as the

[5] Courts also handle the dissolution of nonmarital relationships. In some cases, courts regard couples who never registered their marriages as being in common law or de facto marriages (事实婚姻). In cases involving unmarried couples, courts can rule on property division and child custody.

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"summary procedure"). When a plaintiff submits a divorce petition, the court's case filing division accepts it after establishing that standing requirements are met (i.e., the court has jurisdiction, the plaintiff and defendant are lawfully married to each other, etc.). Then, within five days of accepting the case, the court must deliver a copy of the plaintiff's petition and supporting evidence to the defendant. The defendant, after receiving them, has 15 days to submit a defense statement responding to the plaintiff's claims and evidence (according to Article 125 of the Civil Procedure Law). A defendant's failure to respond does not alter the trial process. Generally speaking, after the defendant's 15-day deadline passes, case filing division staff determine which civil procedure is used – ordinary or simplified – and assign judges accordingly. Case assignment and scheduling clerks (分案排期员) in the case filing division are generally responsible for carrying out these tasks under the supervision of judges (F. Ye 2015:126, 131).

The choice of civil procedure determines the number of judges who try the case. A single judge (独任法官) presides over cases tried using the simplified civil procedure, and a collegial panel of decision-makers (合议庭) is required when the ordinary civil procedure is applied. Decision-makers are judges and citizen lay assessors. The official primary function of lay assessors is to provide public oversight. As we will see in Chapter 5, in practice, they have also been used to alleviate judges' workload. Collegial panels must be composed of an odd number of members (almost always three). Lay assessor participation is limited to collegial panels in first-instance trials. So-called 1 + 2 panels consist of one judge and two lay assessors, whereas so-called 2 + 1 panels consist of two judges and one lay assessor. Collegial panels of five or seven decision-makers have been exceedingly rare (Ye 2004:29–30).

Cases tried using the simplified civil procedure must be closed within three months. If circumstances prohibit meeting this statutory deadline, the Civil Procedure Law allows for a change of procedure from simplified to ordinary (Article 163). Cases tried using the ordinary procedure must be closed within six months, with the option of a six-month extension in special circumstances with the approval of the court president (Article 149). According to the 2007 Measures on Paying Litigation Fees, court fees are discounted by 50% when the simplified civil procedure is utilized (Article 16). In the cases I analyze from Henan and Zhejiang, base court fees were typically ¥300

(US$45) with the application of the ordinary civil procedure and half this amount with the application of the simplified civil procedure.

The two civil procedures differ primarily in the use of solo judges versus collegial panels, the possibility of lay assessor participation, case closing deadlines, and court fees. In addition, the SPC permits simplified methods of communication and notification when the simplified civil procedure is applied. For example, litigants may provide oral statements, and judges may notify litigants of their trial dates and summon witness by telephone, email, fax, or social media messaging in the context of the simplified civil procedure (Chapter 5). In principle, the remainder – including trial procedures, evidentiary standards, requirements concerning written decisions, and so on – is generally the same.

PHYSICAL SEPARATION

Another statutory ground for the breakdown of mutual affection is physical separation for at least two years. According to the Fourteen Articles, courts are supposed to regard separation for at least three years or separation for at least one year following a court's adjudicated denial of a previous divorce request (Article 7) as tantamount to the breakdown of mutual affection. Article 32 of the 2001 Marriage Law relaxed this standard by shrinking the statutory physical separation period from three to two years for first-attempt petitions (Article 32, Item 4). The Fourteen Articles' one-year separation test following an adjudicated denial (Article 7) was incorporated into the 2020 Civil Code: "After the People's Court denies a divorce petition, the court should grant the divorce if one side files for divorce after both sides physically separate for another full year" (Article 1079). The plaintiff must also prove that the breakdown of mutual affection was the reason for the physical separation; separation due to labor migration, for example, fails to meet the statutory conditions. In practice, however, judges will often grant a divorce after inferring from a two-year separation that the breakdown of mutual affection was its consequence, if not its cause (C. Xu 2012:40).

DEFENDANT ABSENTEEISM

Article 32 of the 2001 Marriage Law – which became Article 1079 of the 2020 Civil Code – stipulates that a court should grant a divorce petition if it declares a defendant to be missing: "Where one party is

declared to be missing and the other party starts divorce proceedings, divorce shall be granted." A missing person declaration from a court provides sufficient statutory grounds for a divorce and thus obviates the need for mutual consent or any other proof of the breakdown of mutual affection (Sun 2006:121). For a defendant to be declared missing according to Article 20 of the 1986 General Principles of the Civil Law (Sun 2006:122) and Article 185 of the 2012 Civil Procedure Law, he or she must be of unknown whereabouts (下落不明) for a full two years and fail to reappear after a court posts a public notice (公告) for three months. The 1987 Opinions of the SPC on Several Issues Concerning the Implementation of the General Principles of the Civil Law (Article 26) stipulates, "Unknown whereabouts refers to a situation in which a citizen has left his or her last place of residence without a word [没有音讯]" (Zhao 2018:187).

In practice, however, courts routinely grant divorces in absentia without first going to the trouble of formally declaring defendants missing. What matters is whether the conditions for a missing person declaration are satisfied. Even if a person seeking a divorce from a missing spouse does not request a missing person declaration, the court proceeds with a trial after serving the defendant via public notice (公告送达). The 1992 Opinions of the SPC on Several Issues Concerning the Application of the Civil Procedure Law stipulates that a formal missing person declaration is not required for a divorce trial to be conducted in absentia (缺席审理): "If the whereabouts of either husband or wife are unknown and the other side files a court petition, requests a divorce, and does not request that the defendant whose whereabouts are unknown be declared missing or dead, the court must accept the case and serve the defendant with court papers via public notice" (Article 151; Tan and Wang 2011:116–17; C. Xu 2012).[6] According to the 2012 Civil Procedure Law, a defendant is considered to have been served 60 days after a public notice is posted (Article 92).[7] According to the SPC's 1992 Opinions, a public notice can be placed on the court's bulletin board, posted in the location of the defendant's last known residence, or published in a newspaper (Article 88; Y. Wang 2012:120). The 2015 Interpretations of the SPC on the Application of

[6] This provision is duplicated verbatim as Article 217 of the 2015 Interpretations of the SPC on the Application of the Civil Procedure Law.
[7] This was Article 88 in the original 1991 Civil Procedure Law (Sun 2006:122).

the Civil Procedure Law extends approved locations for the placement of public notices to "the internet and other media" (Article 138). Searchable repositories of courts' public notices are now available online (e.g., https://rmfygg.court.gov.cn/).

The court need only serve a defendant with notice of his trial and make available a copy of the plaintiff's petition. Whether a defendant who has been served shows up for his day in court, submits a written response in lieu of appearing in person, or appoints a representative to speak on his behalf is not the court's responsibility and will not affect the court's adjudicatory role (Dong and Ji 2016:89). Article 62 of the Civil Procedure Law requires both sides of a divorce case, even when represented by legal counsel, to appear in court unless special circumstances prohibit them from doing so, in which case they are to submit their statements in writing. At the same time, however, according to Article 144 of the Civil Procedure Law, "When a defendant who has been served a court summons refuses to appear in court without due cause or leaves midway through the trial without the court's permission, the court may rule in absentia." Thus, even if a defendant whose whereabouts are known refuses to appear in court after successfully receiving a summons, the trial proceeds, and the court rules.

An "in absentia public notice divorce trial" (公告离婚, hereafter "public notice trial") constitutes the breakdown of mutual affection and can therefore serve as the statutory basis of a ruling to grant a divorce (Dong and Ji 2016:91–92). The Fourteen Articles stipulates that courts can grant divorces when defendants can be declared missing, which is to say, when "One side has been of unknown whereabouts for a full two years, the other side sues for divorce, and the court determines the whereabouts to be truly unknown after seeking them via public notice" (Article 12). A plaintiff can simultaneously satisfy the physical separation test and the unknown whereabouts test by claiming her spouse has been missing for two years. Because many defendants in public notice trials are alleged to have been missing for at least two years, public notice trials are often tantamount to physical separation. In practice, therefore, public notice divorce trials are often regarded as satisfying the breakdownism standard and, more often than not, lead to successful divorces.

Strictly speaking, however, the laws provide no clear definition of "unknown whereabouts," much less specify a minimum duration of time the defendant's whereabouts must be unknown before a court

can issue a public notice (Xiong 2012:71). Public notice trials are yet another manifestation of judges' discretionary application of ambiguous rules.

Moreover, public notice trials must be conducted according to the ordinary civil procedure. According to the 1992 Opinions of the SPC on Several Issues Concerning the Application of the Civil Procedure Law, "In cases in which the defendant's whereabouts are unknown at the time the lawsuit is filed, the case may not be tried using the simplified procedure" (Article 169). Because they cannot be conducted by solo judges, public notice trials consume precious judicial resources. Zhejiang's courts have been far more overburdened than Henan's courts. Zhejiang's relatively acute shortage of judges may therefore help explain why public notice trials were less common in Zhejiang than in Henan (Chapter 8).

Divorce trials with AWOL defendants are concentrated in rural areas, where a large share of able-bodied adults participate in labor migration (Tao and Lu 2012; C. Xu 2012:42). Many defendants miss their trials not only because of service of process failures, but also because they opt out of them. Even when they receive a summons, defendants commonly fail to submit written statements or make oral defense statements in court (Zeng 2008:161).

STANDARDS OF EVIDENCE

Even if a plaintiff satisfies the statutory physical separation standard (two years in a first-attempt divorce petition and one year after a failed attempt), she may have trouble proving it to a judge's satisfaction. Convincing reluctant judges of the factual basis of a statutory claim that mutual affection has broken down is nearly futile without mutual consent. Judges overwhelmingly apply the breakdownism standard to justify their decisions to deny divorce petitions, typically using language such as: "Because the submitted evidence is insufficient to prove that mutual affection broke down, the claim lacks a factual basis, and the court therefore denies support of the plaintiff's petition" (Li, Liu, and Yang 2013:35).

> In judicial practice, common court holdings in adjudicated denials of divorce petitions are: "Although both sides frequently quarrel and there may exist some emotional distance, this falls far short of the breakdown of mutual affection. If both sides work to build mutual communication and mutual trust, and correctly deal with their conflicts, husband and

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> wife still have a chance to reconcile"; "Although conflicts have arisen for personality compatibility reasons, mutual affection has not completely broken down. If both sides treasure marital affection, give each other the benefit of the doubt, and learn to forgive and compromise, husband and wife still have a chance to reconcile completely." (Chen 2005a:155)

According to the 2008 Guidelines, judges are supposed to treat victims' claims of domestic violence as more credible than offenders' denials (Runge 2015:38) and to consider the interests of the more vulnerable side when ruling on evidence. In practice, however, the burden of proof tends to fall on the plaintiff according to the more general principle of "whoever makes the claim must prove it" (谁主张, 谁举证, paraphrasing Article 64 of the Civil Procedure Law; Hongxiang Li 2014:88). Judges rarely take plaintiffs at their word for claims of domestic violence, especially if the defendant denies the claim (Chen and Duan 2012:36; Hongxiang Li 2014:87), even though judges are fully empowered by the SPC to do so. The 2008 Guidelines call for treating victims' allegations as more credible than defendants' denials in "he said, she said" situations on the premise that "few people would risk the public shame of lying about being beaten and abused by one's spouse" (Article 41; also see Runge 2015:38). Another rationale for relaxing standards of proof in divorce cases involving domestic violence is that women are often reluctant to report abuse to the police, and may therefore lack documentation to support their claims (Hu et al. 2020; Wang, Fang, and Li 2013:35–36; Zeng and Zhou 2019). But judges often side with defendants who state, for example: "It's not true. She fell down on her own. Besides, it's not a bone fracture but a herniated disc. … She's the one who grabbed the shovel and, when raising it to hit me, ended up hitting herself on the head. This was a fight over some trifling matter" (Li, Liu, and Yang 2013:34; also see Fincher 2014:152). As we will see, judges tend to treat men's denials of being perpetrators more seriously than women's claims of being victims of domestic violence.

Such widespread practices violate China's domestic legal standards and international commitments. According to relevant Chinese legal standards of evidence, judges should affirm a plaintiff's claim of domestic violence on the basis of even basic corroborating evidence if the defendant either does not deny the claim or fails to provide counterevidence (Chen and Duan 2012:35; Tan and Wang 2016:185). For example, judges should affirm as factual a claim of domestic violence if the plaintiff submits circumstantial evidence showing that both an

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injury occurred and a domestic dispute occurred the same day (Li, Liu, and Yang 2013:35). In either case, the burden of proof is supposed to fall on the defendant to support his denial of the plaintiff's claim (Li, Liu, and Yang 2013:35; Runge 2015:38; Tan and Wang 2016:185).[8]

To the dismay of scholars and activists, the draft version of the Anti-Domestic Violence Law circulated by the Legislative Affairs Office of the State Council in 2014 contained a provision on the reasonable distribution of the burden of proof that was subsequently deleted from the final version that took effect in 2016 (Deng 2017:108). Despite this legislative setback, the 2008 Guidelines already called on judges to shift the burden of proof to the defendant on the basis of existing legal sources (Deng 2017:109; J. Jiang 2019:232; Runge 2015:38). More specifically, Article 40 of the 2008 Guidelines calls on judges to follow the "preponderance of evidence" standard stipulated by Article 73 of the 2001 Several Provisions of the SPC Concerning Civil Procedure Evidence: when each side submits contradictory evidence that cannot disprove the other side's evidence, the court is supposed to determine which side's evidence is more convincing (Deng 2017:110). Article 64 of this judicial interpretation of the SPC calls on judges to use common sense and intuition to make this determination (S. Wang 2014:21). In US civil courts, establishing a preponderance of evidence "means to prove that something is more likely so than not so" and "that what is sought to be proved is more likely true than not true" (Simon and Mahan 1971:330n2). Judges in China are likewise supposed to rule in favor of one side when they are convinced that the probability is at least 51% that its claims are supported by the available evidence and therefore factual. In other words, the side with the more compelling evidence enjoys a probabilistic advantage and should prevail (Zeng and Zhou 2019). The preponderance of evidence standard was reaffirmed in Article 108 of the 2015 Interpretations of the SPC on the Application of the Civil Procedure Law.[9] Although it is supposed to

[8] The same legal reasoning applies to paternity claims. The court should support a plaintiff's claim that the defendant is the father of her child (or that the defendant is not the father) if she submits supporting evidence, the defendant refuses a paternity test, and the defendant fails to submit counterevidence (Yang 2011:41).

[9] When the SPC amended its 2001 Several Provisions Concerning Civil Procedure Evidence in 2019 (and it took effect in May 2020), the "preponderance of evidence" standard (referred to variously as 优势证据, 优势盖然性, and 高度盖然性) was replaced with a stricter "beyond reasonable doubt" standard (Article 86), which was already part of the 2012 Criminal Procedure Law (Article 53).

relax evidentiary standards and thereby reduce pressure on abuse victims to prove their claims (Y. Jiang 2019:20), we will see in Chapters 7 and 8 that judges almost never apply the preponderance of evidence standard in domestic violence cases.

Judges will not be persuaded by allegations of domestic violence if they lack an understanding of or choose to ignore its legal definition. For example, one court held that "the injury the defendant caused the plaintiff in an act of momentary agitation [一时冲动] is unlawful but not domestic violence" (Li, Liu, and Yang 2013:35). After affirming that the defendant had hit the plaintiff in the face, resulting in a contusion, another court ruled that "evidence submitted to the court by the plaintiff Xiao X proves only that the defendant Wang X beat the plaintiff one time with insignificant consequences, which counts as everyday marital squabbling [吵闹] and marital conflict with occasional physical fighting but without harm, and which cannot be affirmed as domestic violence" (J. Zhang 2018:109). In yet another case, after admitting into evidence police and hospital documentation of the plaintiff's injury, the court ruled that "in the course of living together, the defendant's everyday physical and verbal abuse [打骂], which occasionally causes minor bodily injury of no real consequence, cannot be affirmed as domestic violence" (J. Zhang 2018:109; also see Cheng and Wang 2018:262).

The case of a woman from Hunan Province illustrates courts' discretionary application of the SPC's requirement mentioned earlier in this chapter that domestic violence be "persistent and frequent" in order to constitute maltreatment. She lost significant eyesight owing to her husband's physical abuse. She also suffered a permanent disability after he broke two of her ribs. When he filed for divorce, she filed a separate private criminal prosecution in which she alleged maltreatment and claimed civil damages for associated medical expenses. In its ruling, the court held:

> It has already been verified as factual that the defendant battered the accuser ten times. However, the defendant's beatings of the accuser constitute occasional occurrences and do not possess the characteristics of frequent, persistent, and consistent [经常、连续、一贯性]. Furthermore, there were reasons for the occurrences of this type of behavior. The defendant's maltreatment of the accuser was not intentional, and therefore does not constitute the crime of maltreatment. (Li 2003:7)

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The court also rejected her claim for civil damages. After she appealed, the court of second instance upheld the lower court's acquittal on the grounds that the "13 occurrences of maltreatment affirmed by the court happened for a reason" (Li 2003:8).[10]

In theory, evidence sufficient to support claims of domestic violence include medical documentation of injuries; photos documenting the injuries; audio or video recordings; text or online messages; physical wounds or scars on the victim for display in court; police reports; witness testimony; documentation from residents' committees or work units; and "remorse letters" (忏悔书, 悔过书), "pledge letters" (保证书), "promise letters" (承诺书), or "apology letters" (认错书), written by defendants as both confessions and cease and desist contracts (Chen and Duan 2012:35, 37; Li, Liu, and Yang 2013:35; Runge 2015:38; Su 2011). The 2015 Anti-Domestic Violence Law stipulates that judges can affirm the occurrence of domestic violence on the basis of a police record of a complaint, a police warning, or a police injury appraisal (Article 20). Although evidentiary standards for claiming civil damages from abuse are higher (Li, Liu, and Yang 2013), any one of these pieces of evidence should be sufficient to establish domestic violence and hence grounds for divorce. In practice, however, judges often exclude or ignore such evidence, particularly when the defendant denies the plaintiff's claim of abuse (Li, Liu, and Yang 2013:35). And, of course, courts cannot award civil damages for domestic violence if they fail to affirm its occurrence in the first place (Li, Liu, and Yang 2013:35).

Henan Province's Zhecheng County People's Court refused to affirm a 24-year-old plaintiff's claim of domestic violence despite an abundance of supporting evidence. On August 13, 2019, her husband viciously attacked her in their clothing store. Security video footage of the store interior documented her husband dragging her across the floor by her hair, slapping and punching her in the face, taking away her cell phone to prevent her from calling the police, and locking the door to prevent her from escaping. A second exterior security camera recorded her hitting the ground after she jumped out of the second-story window. Hospital and police records documented bone fractures in nine places. Most of the fractures, including those in both heels, tailbone, and several vertebrae, were caused by the fall, which

[10] Merry (2009:89–90) discusses the same case.

left her paralyzed below the waist. According to the police report, her left eye socket fracture was the result of her husband's fist. The local police who investigated the incident determined that she had jumped in a suicide attempt even though she insisted that she had jumped to escape with her life. Because the police could not reach a consensus on her husband's criminal culpability, they did not file criminal charges against him – a theme to which I return in Chapter 9. While undergoing inpatient hospital treatment, her father-in-law relayed a death threat: if her husband were sent to prison, he would murder her whole family upon his release.

On June 8, 2020, she filed for divorce. Exactly one week later, on June 15, the county procuracy filed a public prosecution against her husband for intentional injury. Perhaps the court had notified the procuracy of evidence of criminal wrongdoing it discovered in the plaintiff's civil petition. Although that is precisely what should happen according to the law, it rarely does (Chapter 9).

The divorce trial was held on July 14. The court should have granted her divorce petition on fault-based grounds. As in so many cases we will encounter throughout this book, however, her husband withheld his consent to divorce, the court swept aside her allegation of domestic violence, and it instead pursued marital reconciliation through mediation. The court cited two main reasons for refusing to entertain her domestic violence claim. First, the local police failed to attribute the injuries she sustained from the fall to her husband's violence. According to the police, she had jumped on her own volition after choosing to kill herself, not because her husband's violence had compelled her to flee for her life. As so often happens in Chinese divorce litigation (Chapter 7), the court accepted the police determination that her husband's punch caused her facial bone fracture but did not affirm domestic violence on this basis. Second, challenging her credibility and implicitly suggesting her petition was frivolous, the court questioned why – if indeed she was a victim of domestic violence – she had waited ten months to file for divorce. Her husband was arrested on July 21. On July 24, the court notified her that it would delay issuing a verdict on her divorce petition until after the conclusion of her husband's criminal trial. The civil division's decision on her divorce petition would hinge on whether the criminal division found that her husband had indeed committed domestic violence, and both verdicts would be issued together.

At around this time, facing an impasse, she shared her story, video footage, and hospital and police documentation with the media.

Within days her video footage had been viewed over one billion times and sparked public outrage at the court's unwillingness to grant her divorce request. If the public had known that courts ignored similarly compelling evidence of domestic violence in divorce litigation as a matter of course (Chapter 7), its outrage may have been greater and come sooner. On July 28, before the criminal trial had even begun, the court – under immense public pressure – suddenly reversed its position and issued a verdict granting the divorce, granting custody of their child to her, and ordering her husband to pay child support (Feng 2020; Guiyang Evening News 2020; S. Li 2020; Sohu.com 2020; Wee 2020; Xiaoxiang Morning News 2020; Xue 2020). I will return to the theme of the influence of public opinion on judicial decision-making in Chapter 9.

Judges' (mis)use of evidence turns laws and legal guidelines on their head in additional ways. Letters of apology and remorse for abuse should be used not as evidence of the *presence* of mutual affection but rather as evidence that domestic violence occurred and thus of the *absence* of mutual affection. According to the 2008 Guidelines:

> In the course of litigation, the abuser may provide to the victim in writing or orally an apology for his abuse or a promise never to commit abuse again. In the absence of any substantive, concrete acts of contrition, this should be regarded as a display of neither sincere repentance nor genuine abandonment of violent ways. On the contrary, it should be regarded as another means of maintaining control over the victim. For this reason, it should neither be treated as the abuser's remorse *nor used as evidence that mutual affection has not broken down*. (Article 42, emphasis added)

But as we will see from divorce cases in Henan and Zhejiang, judges sometimes improperly use defendants' apologies and promises to support their holding that mutual affection has not broken down and thus to justify their decisions to deny divorce petitions. Judges try to persuade plaintiffs to drop their lawsuits in exchange for their husbands' written expressions of remorse for – and promises to stop – beating them (Xu 2007:204).[11] Judges also frequently use defendants' unwillingness

[11] A husband's pledge to stop beating his wife is sometimes part of a "reconciliation agreement" (和好协议) written under the auspices of judicial mediation and culminating in the wife's withdrawal of her petition. See, for example, Decision #4154866, Jinhua Municipal Wucheng District People's Court, February 16, 2016, Case ID (2015)金婺汤民初字第00222号, archived at https://perma.cc/BV94-YMZ8.

to divorce as evidence of mutual affection and reconciliation potential. Judges even cite the free and voluntary nature of the marriage (自由恋爱), as opposed to an arranged or otherwise coerced marriage, and childbearing as evidence of mutual affection.

Judges exercise similar discretion when considering plaintiffs' claims of physical separation from defendants (Xu 2007:204). Some plaintiffs support claims of physical separation with documentation of a new residence (their own or the defendant's), while others hope the court will take them at their word (Luo 2016:22; C. Xu 2012). Meanwhile, plaintiffs' claims of defendants' unknown whereabouts are often supported by similarly shaky evidence, such as defendants' failure to be found when court personnel attempted to serve their court summons at the official addresses listed on their citizen identity cards, letters (of sometimes dubious provenance) from villagers' committees or residents' committees, or witness testimony from neighbors and relatives (Dong and Ji 2016:91; Sun 2006:122; Zhao 2018).

METHODS OF CLOSING CASES

Courts' respective use of adjudication and mediation to process the roughly 1.4 million divorce petitions they receive each year has ebbed and flowed dramatically over the past few decades. Figure 2.1 depicts time trends with respect to the court adjudication of divorce petitions, the empirical focus of this book. By displaying adjudications as a proportion of all concluded cases, it omits the residual categories of mediations and withdrawals.[12] Because the proportion of withdrawals has remained stable in recent years (accounting for a steady one-quarter of all the divorce petitions courts received), fluctuations in adjudication rates imply inverse fluctuations in mediation rates. In other words, declines in adjudication rates are commensurate with increases in mediation rates.

Two patterns are particularly noteworthy. First, court adjudication rates rose consistently from the late 1980s until the early 2000s before dropping equally consistently through the early 2010s, after which adjudication rates rose once again. The peaks and valleys in China's court system of alternating shifts between promoting adjudication and promoting mediation cannot be explained by changes in civil law

[12] Cases rejected by courts (驳回) and concluded by "other means" are additional residual categories that account for only about 1% of all divorce cases concluded by courts.

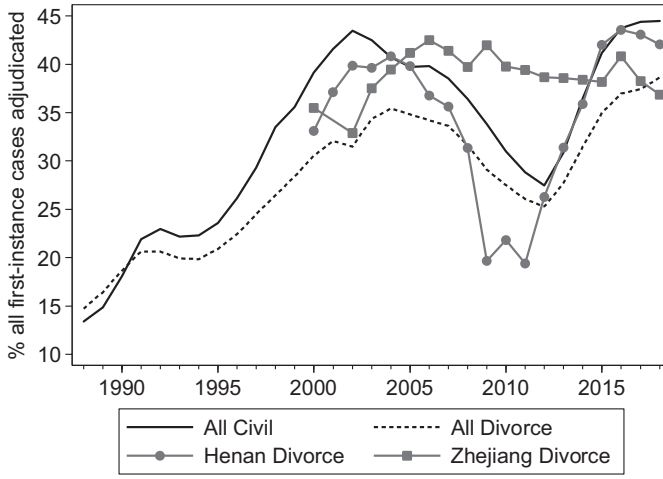

Figure 2.1 Adjudications as a proportion of all first-instance concluded cases
Sources: CLY, various years; Ministry of Civil Affairs of China, various years.

doctrine, in the composition of civil court dockets, or in the changing desires of litigants, much less in the influence of world society. Rather, they reflect the full extent to which courts fall in line with shifting policy directives from above. Like the rest of the state bureaucracy, courts in authoritarian political contexts are sensitive to the direction in which political winds blow and steer accordingly (Moustafa 2014:289).

Calls from top leadership beginning in 2003–2004 to "construct a harmonious society" ushered in the era of China's "turn against law" and "return to populist legality" by promoting populist courtroom mediation practices that blended elements of Maoism and Confucianism (Liebman 2011b, 2014; Minzner 2009, 2011). During this time, some courts even set targets of "zero adjudications" (零判决; X. Ye 2015; Zheng 2018:135), which is equivalent to 100% mediations and withdrawals. In Henan, some courts participated in zero adjudication competitions (Guo 2009; Yang 2010). As abruptly as it began, China's "mediation surge" ended in 2011–2012 after a new 2011 SPC opinion called for an end to the practice of intercepting and mediating cases before they had a chance to be filed and entered into court dockets (Li, Kocken, and van Rooij 2016: 14–15). This latest about-face was further supported by a series of

SPC opinions and guidelines on the proper use of mediation; an overhaul of performance evaluation systems that ended the practice of "overusing mediation and underusing adjudication" (重调轻判), including the widespread practice of forced mediation; the establishment of a "litigation system centered on adjudication" (以审判为中心) as part of the fourth five-year outline for judicial reform (2014–2018); and efforts to address a perceived crisis of low public confidence in courts made all the more urgent by calls beginning in 2013 from the top leadership "to let the masses experience fairness and justice in every judicial case" (让人民群众在每一个司法案件中都感受到公平正义; Xu, Huang, and Wang 2014:87–88, 93–94; Yan and Yuan 2015; Zhang 2016a:27).

In absolute numbers, divorce mediations increased steadily from 441,656 in 2004 to 612,304 in 2012, after which mediations declined steadily to 475,193 in 2018. Adjudication trends, of course, are in the reverse direction: between 2012 and 2018, following the end of the "mediation surge," the volume of court divorce adjudication rose by 70% from 314,468 to 534,589 cases. Judges' imperative to mediate has waned while their imperative to maximize efficiency and minimize unrest persists. Under growing pressure to clear their mounting divorce dockets efficiently while simultaneously promoting family and social stability, judges' commensurately growing tendency to deny divorce petitions – resulting in China's judicial clampdown on divorce (Chapter 6) – is not hard to understand.

Second, owing to the Marriage Law's emphasis on mediation, adjudication has been less common in divorce cases than in other civil cases. Nonetheless, when looking at China as a whole, divorce tracks with the larger category of civil cases of which it is a part. Figure 2.1 also includes adjudication trends for the two provinces I analyze in this book. While Henan mirrors the national pattern, Zhejiang's courts appear to have leap-frogged the "mediation surge" and used adjudication at fairly steady levels since 2005, at least in the context of divorce.

JUDICIAL WORK FLOW

Written court decisions afford a glimpse of how divorce cases move through the judicial pipeline. After a plaintiff files for divorce, the court must then approve and accept it. Lawsuits rejected by the court

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are not added to its docket, are not published, and are therefore beyond the scope of analysis. Courts typically accept divorce petitions on the same day plaintiffs file them. Upon accepting the case, the court issues a written notice to the plaintiff to this effect (受理通知书). The court may also issue a written notice requesting evidence in support of her claims (举证通知书). The court then provides service of process to the defendant by delivering: a copy of the plaintiff's petition, a notice requesting that he respond (应诉通知书) with a written defense statement within 15 days, and a notice requesting evidence in support of his counterclaims. Both plaintiff and defendant receive a court summons notifying them of their trial date (开庭传票 or 传唤). Court decisions indicate whether the defendant's whereabouts were unknown, whether it notified him via public notice, whether he responded within 60 days, and whether the trial was conducted in absentia. If both sides show up for their trial, the court will first attempt a mediated reconciliation. Reconciliation failures are often noted in written court decisions (调解未果, 调解无效, or 调解未成). Court decisions sometimes mention that mediated reconciliation was not attempted owing to the defendant's failure to appear for the trial. Court decisions usually indicate the trial date and whether the trial was open to the public (公开开庭) or closed (不公开开庭). The vast majority of trials were open to the public. When applying the simplified civil procedure, courts typically tried divorce cases about a month after accepting them in order to provide sufficient time for defendants to submit their responses and for both sides to submit supporting evidence. When applying the ordinary civil procedure, by contrast, courts typically tried divorce cases two or three months after accepting them. Recall that the ordinary civil procedure must be applied in public notice trials. Delays associated with the ordinary civil procedure are, above all, caused by the requirement that public notices be posted for 60 days when defendants' whereabouts are unknown. Courts usually issue their written adjudicated decisions within a month of the divorce trial. All told, the entire process from case filing to written decision typically lasts 30–60 days in simplified procedure cases and 100–150 days in ordinary procedure cases. Given that most first-attempt divorce petitions are denied, however, the entire divorce litigation process from initial filing to granted divorce often takes between one and two years (Chapter 9).

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SUMMARY AND CONCLUSIONS

Even in the absence of mutual consent to dissolve a marriage, Chinese judges have a great deal of legal leeway to grant a unilateral divorce. They can choose to grant a divorce petition on the basis of breakdownism, a no-fault legal standard permitting unilateral divorce owing to irreconcilable differences or physical separation. They can also use various faultism standards to grant a unilateral divorce petition on the grounds of domestic violence or other forms of bad spousal behavior. Finally, they should grant divorce petitions when defendants are AWOL. These various domestic legal tests are consistent with globally institutionalized legal models.

Yet, even when one of China's fault-based standards is satisfied, such as when a plaintiff supplies compelling evidence of marital violence, judges are far more likely to deny the petition using the breakdownism standard than to grant the divorce using an applicable faultism standard.

> The Marriage Law takes the "breakdown of mutual affection" as the basis for divorce. This standard, however, is subjective and mechanical. Although Article 32 of the Marriage Law lists [fault-based] conditions under which divorce "should" be granted, courts, influenced by the law's legislative spirit, tend to use the "breakdown of mutual affection" as grounds for divorce. (Hongxiang Li 2014:87)

The legislative spirit to which the author of this passage refers is the legal ambiguity baked into the Marriage Law, giving judges flexibility to heed ideological pressure to "oppose frivolous divorce" or to grant divorce petitions depending on their "ad hoc determinations that best suited the circumstances of specific cases and the policy emphases of the moment" (Huang 2005:187; also see W. Zhou 2018).

When judges deny divorce petitions on the basis of breakdownism, they often do so in a way that subverts China's own laws and global legal norms concerning the freedom of divorce. Owing to the wide discretion judges wield to determine the amount of love present and possible in the marriage, they typically treat a defendant's unwillingness to divorce as proof that mutual affection has not broken down. When a defendant withholds consent, a plaintiff's unilateral insistence on divorce is nearly futile regardless of whether her claim is based on the no-fault breakdownism test of incompatibility or the faultism test of domestic violence (Ma 2006:26; Xu 2007:204). Plaintiffs' claims of

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abuse and defendants' denials are often reduced to "she said, he said" scenarios in which judges deny the divorce petition unless the defendant consents to the divorce.

Judges' impulse to deny divorce petitions by denying that mutual affection broke down is further facilitated by their wide discretion to exclude or affirm evidence that litigation parties submit in support of their claims. As we will see in subsequent chapters of this book, domestic violence claims had no meaningful bearing on whether a court granted a divorce request and may have even been counterproductive (Chapters 7 and 8). Plaintiffs' best chances for getting divorced were either when their spouses consented or when their allegedly missing spouses were served by public notice. Mutual consent and public notice trials greatly boosted plaintiffs' chances of success. Even when – or especially when – plaintiffs made claims of marital violence and backed them with evidence, judges often downplayed as insufficient or altogether excluded the evidence in question and ruled against such claims. In their child custody determinations, judges likewise often excluded relevant evidence of horrific abuse on the grounds that it could not be authenticated or definitively linked to defendants (Chapter 10).

This chapter was devoted to the question of *how* judges undermine gender justice. The next chapter is devoted to the question of *why* judges do so.

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